

been contradicted as to certain material points by the testimony of witnesses. This map was made at the *lowest stage of water ever known in the Mississippi river*, and as to this map, the Supreme Court of Tennessee said:

“Much stress is laid upon the chart made in 1874, under the direction of Col. Suter, and his interpretation of the topographical signs and tracings appearing upon it, tending to establish that at that time there was timber growing upon what is shown on the chart to be bars and banks in the river. Complainant also examined civil engineers, who undertook to interpret these maps and state what they showed in relation to accretions upon Dean’s Island and the width of the river at the time they were made. This evidence is not entitled to very great weight. The chart is not the result of a careful survey of the river and its banks, but, in the main, from an inspection of it made from the deck of a steamboat. It was a mere steamboat reconnoissance.” Pp. 116, 117.

And, again,

“Col. Suter does not testify from his personal recollection of the river and its banks. There was nothing about Dean’s Island to attract his special attention to it, and its banks were a very small part of the reconnoissance made by him. He had not been there for nearly thirty years, and could only testify what he understood the topographical signs upon the chart to mean. The civil engineers examined for complainant read these signs differently, and under their interpretation the chart tended to support the insistence of complainant that no accretions had formed on Dean’s Island at that time.” P. 119.

A map of this kind was referred to by this court in the case of *Moore v. McGuire*, 205 U. S., 214, 222, where it

was said that, although showing the channel west of a certain island, which the court in that case held to have been east of the island, and which is shown on the reconnaissance map as a sand bar, it said:

“But in any event it would hardly do more than confirm a conjecture suggested by other sources which we shall mention, that in some years the western passage was as good as or better than the more permanent one to the east.” P. 222.

It thus appears, that to undertake to establish the center of the bed of the river as it flowed in 1876, would be an almost hopeless undertaking. Witnesses living in the neighborhood who were available ten years ago say that the old banks cannot be located. After the avulsion waters for a long time covered the abandoned bed of the river, and when the current ceased to flow through it, the filling up process was rapid. Great forest trees cover parts of this territory, while, as stated in the opinion in 119 Fed. at 812, a portion of the land has been under cultivation for many years. The river bed of 1823 is capable of location, and no other bed can be determined with any sort of accuracy. These facts will be considered by this Court, especially when to adopt the river bed of 1823 as the true boundary line will give effect and force to the well-established rule governing reliction, and will restore to each state that which originally belonged to her and to her citizens.

CONCLUSION.

In conclusion, we respectfully submit,

1. That so far as the boundary line between Tennessee and Arkansas is concerned, it is the middle of the main

channel or main bed of the river, as defined in the treaty between the United States and Spain, in 1795, and as adjudged in *Cessill v. State*, 40 Ark. 501; *Wolfe v. State*, 104 Ark. 140; *Moss v. Gibbs*, 10 Heisk. 283; *Foppiano v. Speed*, 113 Tenn. 167; *State v. Pulp Company*, 119 Tenn. 47, and *Stockley v. Cissna*, 119 Fed. 812.

2. In any event, in the abandoned channel of the river, the point to be ascertained is the middle of said channel or bed, and not what was the line of steamboat travel immediately prior to the avulsion.

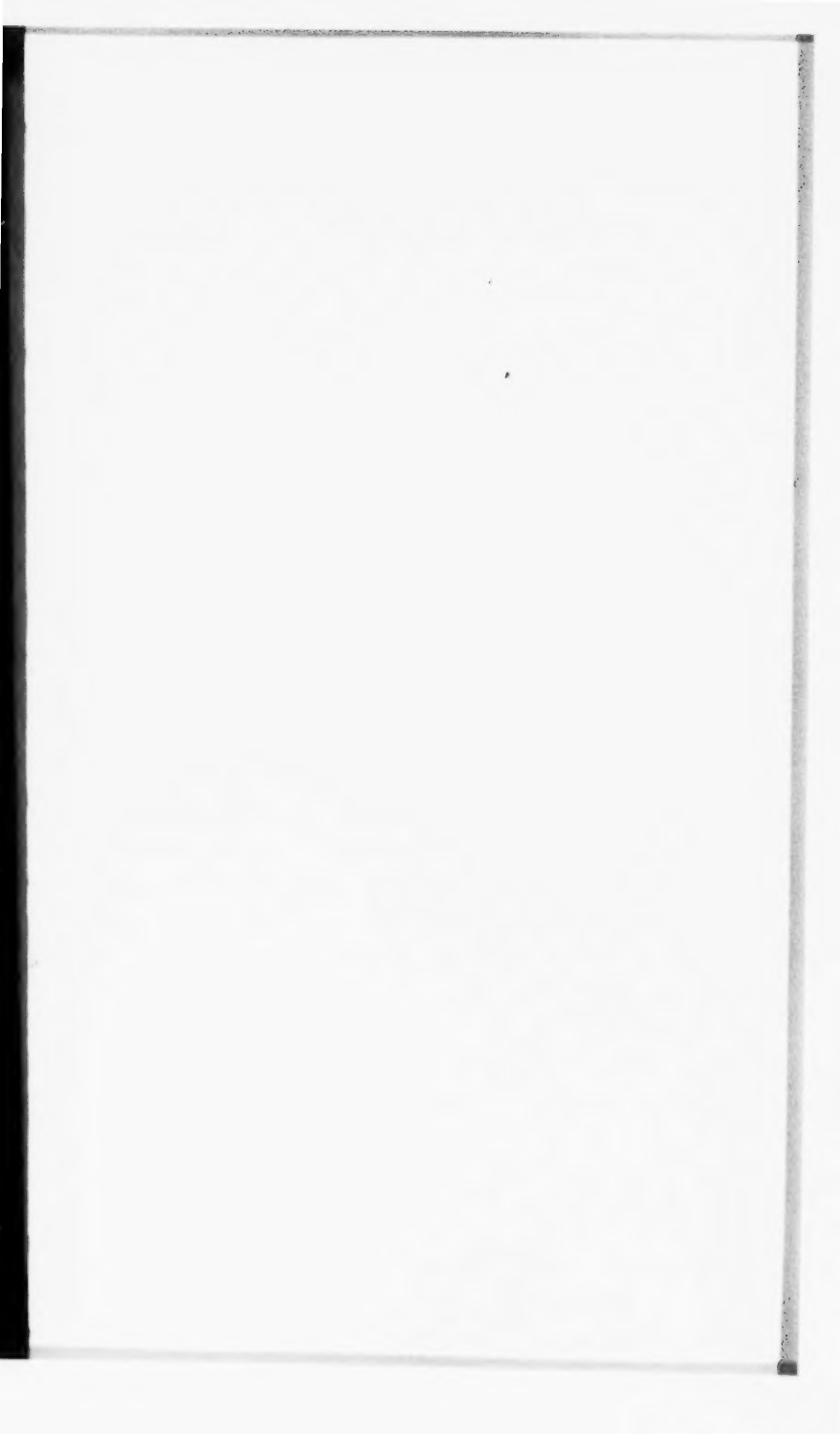
3. That by reliction, the lands formerly belonging to Tennessee and on the left side of the midchannel or the bed of the river, as shown in Humphrey's map in 1823, belong to the State of Tennessee, and those on the right belonging to it belong and should be adjudged as the property of the State of Arkansas.

4. That the river as it run in 1823 as shown by the Humphrey's map is the only feasible and practicable channel by which and from which the center line of the river can be ascertained and the boundary determined.

Respectfully submitted,

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JAMES D. MAHER

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Supreme Court of the United States

OCTOBER TERM, 1913.

STATE OF ARKANSAS,
Complainant,

vs.

STATE OF TENNESSEE,
Defendant.

No. 19
Original.

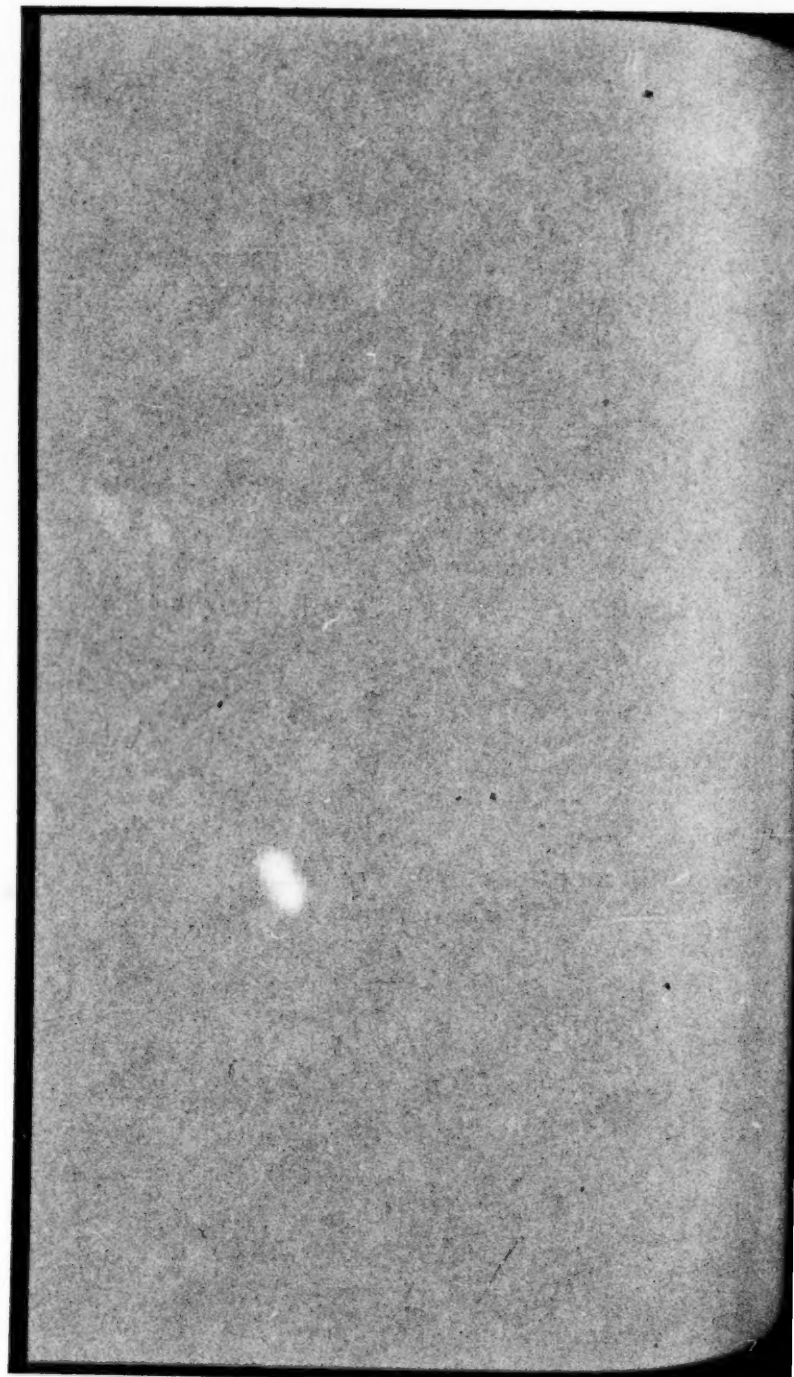
**Supplemental Argument for State
of Tennessee.**

FRANK M. THOMPSON,

Attorney General for Tennessee,

ALBERT W. BIGGS,

Solicitors for State of Tennessee.



INDEX AND AUTHORITIES.

1st. The right to recover submerged lands does not depend upon the principle of accretion, as argued in the brief for the State of Arkansas, but because the title is in the owner of the submerged land, and as such, he is entitled to deposits made thereon, whether resulting from accretion or avulsion, or reclamation produced by artificial means. (Pages 1 to 22.)

Cases cited:

<i>Morris v. Brooke</i> , Delaware Common Pleas, reported in 53 Am. Rep. 215.....	10, 11, 12, 13
<i>Mulry v. Norton</i> , 100 N. Y. 426, 53 Am. Rep. 215	13, 14, 15, 16, 17
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<i>Fowler v. Wood</i> , 73 Kan. 511, 117 Am. St. Rep 534, 570	20
<i>Angell on Water Courses</i> , 5th Ed., p. 61, foot- note 4	9
<i>Farnham on Waters</i> , Vol. 1, p. 331	21
<i>Widdicombe v. Rosemiller</i> , 118 Fed. 295	20
<i>Lamprey v. State</i> , 52 Minn. 181, 18 L. R. A. 670	6, 7
<i>Hargraves' Law Tracts</i> , 36, 37	9, 10
<i>Sir Matthew Hale's de Jure Maris</i> , Ch. 4, 6	9, 10

2d. The answer of the defendant denies there were any accretions to the Arkansas shore prior to 1876. (Pages 2 to 5.)

Rec. p. 2 to 5.

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In the Supreme Court of the United States

OCTOBER TERM, 1913.

STATE OF ARKANSAS,

vs.

No. 7 Original.

STATE OF TENNESSEE.

**SUPPLEMENTAL ARGUMENT FOR THE STATE
OF TENNESSEE.**

May It Please the Court:

We desire to present for the consideration of the Court, a supplemental argument as to the seventh proposition stated in brief for complainant at page 17, which is as follows:

“When the avulsion of 1876 occurred, land, which had been theretofore submerged by the gradual encroachments of the river and had become the river bed, was not restored to the original proprietor on

the retirement of the river, because the recession of the water was sudden and visible, not gradual and imperceptible. The doctrine of reliction only applies when land is uncovered gradually and imperceptibly."

Brief for Arkansas, p. 17.

This proposition is discussed at pages 35 to 51, inclusive, of the printed brief filed in her behalf. The position of the State of Arkansas, as stated upon pages 35 and 36 of the Argument, is as follows:

"This brings us to the seventh proposition of law advanced above, which relates to the recession of the water from the abandoned bed of the river, as the result of the avulsion, and to the eighth and ninth propositions of law, relating to the effect of the gradual encroachment of the river on the title of the riparian owner and the vesting in the State of title to land which gradually and imperceptibly becomes a part of the bed of a navigable river."

Brief of Arkansas, pp. 35, 36.

ANALYSIS OF THE ANSWER OF THE STATE OF TENNESSEE PERTINENT TO THIS PROPOSITION.

As pertinent to this proposition the attention of the Court is called to the answer of the State of Tennessee as to the changes made on the Arkansas and Tennessee banks, and especially the Dean's Island bank on the Arkansas shore between the year 1835, at which time the banks and course of the river may be definitely determined, and the date of the avulsion in 1876. We quote:

"Futher answering the third paragraph of the bill, respondent denies that prior to 1874 there had been any accretions to the west of Dean's Island, or any erosion into the Tennessee shore opposite, or that the main channel of the Mississippi River, or the channel of commerce of said river, had been changed or deflected from around the north of Island 37 to between said island and the main Tennessee shore, as alleged in the bill."

Ans. pp. 3, 4.

* * * * *

"It is true that since Tennessee and Arkansas were admitted to the Union many changes have occurred in the course and banks of the Mississippi River, and while some of said changes were by erosion and accretion, nevertheless, changes from such causes did not occur at all the places designated in the five subdivisions of the fifth paragraph of the bill, which respondent now specifically answers:

(1) It is true that considerable portions of Dean's Island on the east and southeast sides thereof had been gradually worn or washed away by the waters of the river.

(2) Respondent denies that there had been, as alleged in the bill, erosions into the Tennessee bank opposite the south and west part of Dean's Island, which had caused said shore line to recede, and Dean's Island to increase by accretions, whereby Tennessee lost and Arkansas gained; but on the contrary she avers that some changes had been made in the shore line on the Tennessee side, immediately south and west of Dean's Island, but not southwest thereof, and she further avers that such changes as had occurred on the Tennessee shore prior to 1876 were the *result of avulsions and not of erosions*, and

therefore Tennessee did not lose, nor Arkansas gain thereby.

(3) It is true that there had been some considerable erosion into the Arkansas shore or bank north of and opposite to Island 37 and a corresponding, or greater, addition by accretion to said island.

(4) Whether there had been accretions to the Arkansas bank and erosion into the Tennessee shore at the place called Plum Island No. 38, respondent is not advised, and therefore can neither admit nor deny the allegations of the fourth subdivision of the fifth paragraph, but demands proof thereof.

(5) It is true, as respondent is informed, that between the places called Devil's Elbow and Brandywine Point, the Arkansas bank or shore had lost and receded by erosion, and the Tennessee shore had correspondingly, or in a greater degree, gained by accretions."

Ans. pp. 6, 7.

"Respondent denies that all the changes in the Mississippi River prior to 1876 at what complainant calls the *locus in quo*, were gradual and imperceptible, as alleged in the sixth paragraph of the bill."

Ans. p. 7.

"9. Respondent, upon information, denies that prior to the avulsion of 1876 there had been any permanent addition to, or enlargement of, the Arkansas shore or bank by accretion along what complainant calls the *locus in quo*, and avers that at many places, some of which are admitted in the bill, there had been permanent gains to the Tennessee shore by gradual and imperceptible accretions, by which said shore was extended beyond the bank of 1823."

Ans. pp. 15, 16.

Thus, the answer denies the averments of the bill, that the changes at the *locus in quo* between 1835 and 1876 were gradual and imperceptible, and likewise denies that there were accretions to Dean's Island on the Arkansas shore during that period. It refers to the decision of the case of the *State of Tennessee v. Muncie Pulp Company*, 119 Tenn., p. 47, as sustaining its denial of the facts as set forth in the answer. (Ans. pp. 12, 13.) The answer also avers that the changes in the Mississippi River at the *locus in quo* prior to 1876 were the result of avulsions and not erosions. Hence, under the facts thus stated in the answer, and which on this motion are deemed to be true,

The Question Presented Is:

Whether lands submerged as the result of an avulsion, when restored by the recession of the waters and capable of being identified, belong to the original owners, when the recession of the water results from an avulsion.

Arkansas contends that the doctrine of reliction or the reappearance of submerged lands,

"only applies when land is recovered gradually and imperceptibly."

Brief of Arkansas, p. 17.

This is again stated on page 36 of the Argument:

"We submit, in the first place, that reliction, meaning land from which the water has receded, has no reference to land uncovered by the *sudden recession of water resulting from an avulsion*, but that it

is similar in principle to the doctrine of accretion."
(The italics are ours.)

Brief of Arkansas, p. 36.

If the position of Arkansas is correct, then there is no such thing as the restoration of submerged lands, unless it is the result of an accretion, and the rule governing accretions would give to the riparian owner the lands so gained, whether it was submerged land or not.

The reasons usually given for the above rule, that is, that the riparian owner is entitled to what may be added to his land by accretion, are: First, that it falls within the maxim "*de minimis lex non curat*," or, because the riparian owner, by the action of the encroachment of the water, is liable to lose soil, and he should also have the benefit of any land gained by the same action; or, which seems to us the better reason and the broader principle, that being the riparian owner, he is entitled to remain such, and not to be cut off from access to the water by formations made adjoining his land as the result of accretions. In *Lamprey v. State*, 52 Minn. 181, 18 L. R. A. 670, the Court, after noticing the first two of the above reasons, said:

"But it seems to us that neither of these are adequate reasons for departing from a well-settled principle. Both of them are more imaginary than real, and would occur only in exceptional or extreme cases, and are almost as likely to occur in the case of riparian ownership on a tortuous river, with an ill-defined or changeable channel, as in the case of such ownership on the borders of a lake. The owner of a mere "rim" on the bank of a river may some-

times acquire an accretion or reliction much larger than the parent estate, but that is an incident to all riparian ownership; and it was never suggested, in the case of a stream, that such a state of facts furnished any reason for making the case an exception to the general rule.

Courts and text writers sometimes give very inadequate reasons, born of a fancy or conceit, for very wise and beneficent principles of the common law, and we cannot help thinking this is somewhat so as to the right of a riparian owner to accretions and relictions in front of his land. The reasons usually given for the rule are either that it falls within the maxim, *deminimis lex non curat*, or that, because the riparian owner is likely to lose soil by the action or encroachment of the water, he should also have the benefit of any land gained by the same action. But it seems to us that the rule rests upon a much broader principle, and has a much more important purpose in view, viz., to preserve the fundamental riparian right on which all others depend, and which often constitutes the principal value of the land, of access to the water. The incalculable mischiefs that would follow if a riparian owner is liable to be cut off from access to the water, and another owner sandwiched in between him and it, whenever the water line had been changed by accretions or relictions, are self-evident, and have been frequently animadverted on by the courts."

18 L. R. A., 677-678.

The position of the State of Tennessee is that it is not essential for submerged lands to be restored as the result of accretion, but, as in the instant case, it may result from an avulsion, although the filling up or restora-

tion of land caused by a recession of the waters is slow and gradual.

The bill avers that the recession of the water was gradual, saying:

"The waters *gradually* receded from the old and circuitous channel about Island No. 37 and Devil's Elbow, and that which had before been the bed of a large river, became, in due course, comparatively dry land."

Bill, p. 5.

CONTENTION OF TENNESSEE.

We maintain that it is immaterial whether the restoration of the land was by accretion, avulsion or caused by the act of man. In any of these events, where lands which have been submerged and are capable of being identified, they belong to the original owner, whether they be regained from any of the above causes. The principle upon which the owner of submerged land is entitled to land formed within his original boundaries is that when the soil is covered by water or the top of his land is washed away, he does not thereby lose ownership of the land thus covered by the water, and when land is formed within his original boundaries he becomes the owner of it.

The theory upon which the right to be restored to lands lost by submergence is no where better stated than in a footnote to the fifth edition of Angell on Water Courses, p. 61, footnote 4, where it is said:

“The changing of the bed of the river Connecticut, in the town of Weathersfield, has been the occasion of much litigation in that town, respecting the title to the soil. Mr. Butler, who owned a tract upon which the river was encroaching, found, after a while, some of his land appearing on the opposite side of the river, and accordingly laid claim to it. This claim was disputed, as he never owned land on that side of the river. It was a long while before this case was decided. There appeared some difficulty in making the jury who sat on the case to understand the merits of the question. Mr. Ingersoll, a member of the Ingersoll family of New Haven, was the counsel employed by Mr. Butler. He illustrated the case by supposing that Mr. B. had built a castle on the land in question. Although the ground on which it stood might be overflowed, it was still his castle, and the ground was his on which it stood, and he had a right to his property wherever he could find it. The case was finally determined in accordance with these views. (From Hayward’s New England Gazetteer.)

In *Hargraves’ Law Tracts* (Sir Matthew Hale’s *de Jure Maris*), 36, 37, it is said:

“If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it, or though the marks be defaced, yet if by situation and extent of quantity and bounding upon the firm land the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject does not lose his property, and accordingly it was held by Cooke and Foster, M. 7 Jac. C. B., though the inundation continue forty years.’ But if it be freely left again by the reflex and recess of the

sea, the owner may have his land as before, if he can make it out where and what it was: for he cannot lose his propriety of the soil, though it be for a time become part of the sea, and within the admiral jurisdiction while it so continues."

And again:

"As touching islands arising in the sea or in arms of creeks or havens thereof, the same rule holds which is before observed touching acquets by the reliction or recess of the sea, or such arms of creeks thereof. Of common right and *prima facie* it is true they belong to the crown, but where the interest of such *districtus maris*, or arm of the sea or creek or haven doth in point of property belong to a subject, either by charter or prescription, the islands that happen within the precincts of such private propriety of a subject will belong to the subject according to the limits and extents of such propriety."

In the early case of *Morris v. Brooke*, decided July, 1815, by the Delaware Court of Common Pleas, and reported in a note, 53 Am. Rep. 215, the question of the reappearance of submerged land and the principles upon which it is founded were announced. That case has been frequently cited and quoted from. It appears from the report in 53 Am. Rep., *supra*, the plaintiff rested his title to the claim of a bar upon two grounds: First, that it was annexed by alluvion to Little Tinnicum; and, second, that it was found on the same spot that was formerly occupied by Little Tinnicum, which had been washed away by the river for a very considerable distance, but thus restored again.

The Court found that as the bar had formed below the island and was for a long time entirely distinct from it, it would not afford support to the plaintiff's claim to it as of alluvion, but held for the plaintiff upon the second ground. We quote from the opinion where the Court states the rule contrary to the contention made here for the State of Arkansas:

"New islands arising in the sea or in a navigable river *prima facie* belong, according to the common law, to the king, in England, and in this country to the State. But this rule is not universal.

The right to the new islands and also to lands gained by alluvion or dereliction (in cases where they are not gained by *insensible* degrees), all of which are governed by the same principles, follows *the right to the soil which is covered with water*. As the king is the proprietor in general of the soil covered with the sea or a navigable river, it is reasonable that he should have the soil where the water leaves it dry; and this stands on the ground of the prerogative.

But where the right to the soil when covered with water belongs to a subject, he is entitled to all these increments (2 Bl. Com. 262; Hale de Jure Maris, chaps. 4 and 6)." (Italics as they appear in the opinion.)

53 Am. Rep. 215, 216.

After quoting from *Hale de Jure Maris*, Chap. 4 and 6, the Court concluded:

"The case of the *Town of Shinbridge*, in 18 H. 3, is stated in page 16. 'The river of Severn had gained upon the town of Shinbridge so much that its channel ran over part of Shinbridge lands and lost

part thereof unto the other side (Aure), and then threw it back to Shinbridge. It shall not belong to Aure, neither was it at all claimed by the king, though Severn be in that place an arm of the sea; but it was restored to Shinbridge as before. The propriety of the soil was not lost to the owners who had it before.' 'The soil under the water must needs be of the same propriety as it is when it is covered with water. If the soil of the sea while it is covered with water be the king's, it cannot become the subject's because the water has left it. But when the land, as it stood covered with water, did by particular usage or prescription belong to a subject, then *recessus maris*, so far as the subject's particular interest went while it was covered with water, so far the *recessus maris, vel brachii ejusdem*, belongs to the same subject.' Id. p. 31. 'As touching islands arising in the sea, or in the arms or creeks, or havens thereof, the same rule holds which is before observed touching acquets by the reliction or recess of the sea, or such arms or creeks thereof. Of common right and *prima facie*, it is true they belong to the crown, but where the interest of such *districtus maris*, or arm of the sea or creek or haven, doth in point of propriety belong to a subject, either by charter or prescription, the islands that happen within the precincts of such private property of a subject will be long to a subject, according to the limits and extent of such propriety, for the propriety of such a new accrued island follows the propriety of the soil before it came to be produced. Id. 36, 37.

This principle, so strongly supported by authority, and so evidently grounded on reason and justice, proves that Wilson's bar is not to be considered as a new island belonging to the commonwealth, and the

subject of a grant from the commonwealth, but that it is a part of that island and the property of the owner of that island. Though the surface of the lower part of that island was destroyed by the force of the winds and waves, and it was consequently overflowed by the water of the river, yet the owner did not lose the propriety of the remaining soil covered by the water. If it was regained, either by natural or artificial means, it continued to belong to the original proprietor. He might embank it and thereby again exclude the waters, if circumstances permitted. The earth deposited on it by the river became his by the right of alluvion, and, of course, this island formed on it by such deposit became his. And though it probably has now extended beyond the limits of the old island, the addition is plainly an alluvion, as it has arisen from gradual and imperceptible accretions."

In *Mulry v. Norton*, 100 N. Y. 426, 53 Am. Rep. 215, the Court had for determination the title to Far Rockaway Beach. It appears that between 1835 and 1869 the beach had washed away, but had subsequently reappeared. The Court did not deem it important as to whether the reappearance had been gradually and by accretion, or otherwise, for it said:

"It is quite unimportant, if not impossible, to follow in detail, but usually consisted of a line or group of bars, shoals, islands and channels, extending from the inlet to the shore of the mainland beyond the premises in dispute, but which were constantly undergoing physical changes by the influence of the

laws to which they were naturally subject." (53 Am. Rep. 208.)

This is further emphasized when the Court proceeds to announce the principles governing the submergence and reappearance of land, which it does after discussing the general rules of accretion and erosion, as follows:

"It is not, however, every disappearance of land by erosion or submergence that destroys the title of the true owner, or enables another to acquire it, for the erosion must be accompanied by a transportation of the land beyond the owner's boundary to effect that result, or the submergence followed by such a lapse of time as will preclude the identity of the property from being established upon its reliction. Land lost by submergence may be regained by reliction, and its disappearance by erosion may be returned by accretion, upon which the ownership temporarily lost will be regained.

When portions of the mainland have been gradually encroached upon by the ocean, so that navigable channels have been extended thereover, the people, by virtue of their sovereignty over public highways, undoubtedly succeed to the control of such channels and the ownership of the land under them in case of its permanent acquisition by the sea. It is equally true, however, that when the water disappears from the land, either by its *gradual retirement therefrom or the elevation of the land by avulsion or accretion*, or even the exclusion of the water by artificial means, its proprietorship returns to the original riparian owners. *Angell Tide Waters* 76, 77; *Houck Rivers* 258. Neither does the lapse of time during which the submergence continues bar the

right of such owner to enter upon the land reclaimed, and assert his proprietorship. *Angell Tide Waters* 77-80, and cases cited." (53 Am. Rep. 210, 211.)

After citing and quoting from authorities, the Court concluded as follows:

"The evidence in the case and the finds of the trial court concur in establishing the fact that during the period of change hereinbefore mentioned, portions of the beach in front of plaintiff's premises became submerged, but at all times there existed upon or near such premises, shoals, bars or islands, which afterward became the nucleus around which gathered the deposits now composing the land subject to litigation. It seems to us clear that the owners of this property did not lose their title thereto by reason of the changes described, and that the state has not acquired any property therein. The sovereign succeeds to the ownership of such islands and formations only as are originally created and located in tideways outside of the boundaries of property subject to individual ownership." (53 Am. Rep. 212-213.)

The fact that at the time this suit was pending there was a lagoon between the plaintiff's hotel property and the beach was held to constitute no obstruction to the proprietorship of the beach formation, because it was located within the original boundaries of the plaintiff's possessions. Said the Court:

"It would seem also to follow as the necessary consequence of these rules that the existence of the lagoon between the plaintiff's hotel property and

the beach constitutes no obstruction to his proprietorship of the beach formation, however created, if located within the original boundaries of his possession. *Deerfield v. Arms*, 17 Pick. 43; s. c., 28 Am. Dec. 275. It was held in the case of *Railroad Co. v. Schurmeir*, 7 Wall. 272, that a sandbar in the Mississippi river divided from the mainland by a slough twenty-eight feet wide, and which at high water was entirely submerged, belonged to the riparian owner, although the acts of Congress made the river a public highway at the place in question. It is also said that 'rocks and shoals lying along the margin of navigable fresh rivers belong to the riparian owners.' *Gould Waters* 77." (53 Am. Rep. 212.)

The case of *Mulry v. Norton*, 100 N. Y. 426, 53 Am. St. Rep. 206, has been frequently referred to as the leading American case upon this question. In commenting upon this case counsel for Arkansas deny its applicability to the facts of this case, saying:

"The Tennessee court quoted from the opinion of the New York court and undertook to apply the rule of law there announced, and which was pertinent to the facts with which the Court was dealing, to an entirely different state of facts controlled by entirely different legal principles. *In the New York case the riparian owner had lost his beach by sudden and violent changes, and it had been restored to him in the same way.*

In the case at bar, Tennessee had lost her shore line by *gradual crumbling away*, and the Tennessee shore into which the river eroded was never restored, but, on the contrary, was carried into the river, and no human being could identify any of that soil which

had eroded from the Tennessee shore during the years when the river was increasing in width."

Brief for Arkansas, pp. 42, 43.

From quotations already made of the answer, the Court will see that the Tennessee shore was lost as a result of avulsions or sudden and violent cavings of the banks, whereby the lands of the riparian owners on the Tennessee side were submerged under the waters of the Mississippi river. The lands thus submerged reappeared as the result of an avulsion, but the river bed filled up slowly by the deposit of alluvium on the bottom of the old bed and the gradual withdrawal of the waters.

If counsel's analysis of the principle of the Mulry case be conceded as correct (which we do not), it supports the contention of Tennessee as here presented, as well as the holding of the Supreme Court of Tennessee in the case of *Muncie Pulp Company v. State*, which is the subject of attack in this case.

In *Chicago v. Ward*, 169 Ill. 392, 61 Am. St. Rep. 185,¹ the question presented was whether the city lost the title to certain portions of Lake Park, which had been submerged by the waters of Lake Michigan, the land being subsequently reclaimed by the action of the city. The

¹We quote the following head notes from 61 Am. St. Rep. 185:

"**RIPARIAN RIGHTS IN SUBMERGED SOIL**—A riparian owner whose land is submerged by water does not lose his property therein if he afterward reclaims it, either by *natural or artificial means*; nor does lapse of time during submersion bar the owner's right to reclaim the land.

DEDICATION—RECLAMATION OF SUBMERGED SOIL—If, after land is dedicated to a city as a public park, it becomes submerged with water, and *the city reclaims it*, it thereby reasserts its title thereto and holds the land subject to the terms of the dedication." (Italics are ours.)

submergence of the land was stated in the opinion to have been—

“plainly discernable after every storm, and the city made unavailing efforts to protect the shore from this destruction.” (169 Ill., p. 406.)

The Court stated the question before it to be:

“Did the city lose its title and rights to the portions of this park submerged by the waters of the lake after its dedication, or did its subsequent reclamation restore the city to its rights? Did the temporary submergence of such portions destroy the restrictions imposed by the dedication, so that the reclaimed portion would not be subject to the same?” (Page 406.)

After quoting from *Hargrave's Law Tracts*, *Morris v. Brooke*, *supra*, *Mulry v. Norton*, *supra*, *Angell on Tidelwaters* 77, 80, *Angell on Water Courses*, Sec. 60, 3 *Washburn on Real Property* 453, *Gale v. Kinzie*, 80 Ill. 132, the Court answered the interrogatory above quoted as follows:

“Under the authorities, and according to all reasonable deductions from legal principles, we must hold that the title to these lands submerged by the action of Lake Michigan was not lost, and by their subsequent reclamation the city has completely reasserted its title thereto, as such title stood at the time of the dedication of the respective plats thereof.” (Page 408.)

**The Correct Principle Governing This Case Announced
and Applied in *Stockley vs. Cissna*, 119 Fed.
812, 831-32.**

The correct principle is that new land forming where plaintiff's land existed before inures to him, not because it may be formed as the result either of accretion or avulsion, or by the act of man, but by virtue of his title to the bed upon which the land is formed. The formation as to the *locus in quo* was before the Circuit Court of Appeals for the Sixth Circuit in the case of *Stockley v. Cissna*, *supra*, and in delivering the judgment of that court, Judge (now Mr. Justice) Lurton referred to the fact of the reappearance of the Trigg lands, either by accretion or some other process, saying:

“As a consequence of the changed course of the river in 1876, these submerged Trigg lands have been restored, *through accretion or some other process*, and are now dry land. It cannot be pretended that, because the surface of these two bodies of Trigg land was washed off, Trigg lost his title to the land so submerged, beyond recovery. The law is otherwise. Land lost by erosion or submergence is regained to the original owner of the fee when by *reliction or accretion* the water disappears and the land emerges.”

119 Fed. 831.

After quoting from Sir Matthew Hale's *de Jure Maris*, as republished in 16 Am. Rep. 54, et seq., *Mulry v. Norton*, *City of St. Louis v. Rutz*, the Court said:

“The locality of the Trigg lands is not a matter

of dispute. It is, therefore, a matter of no importance how long they have been submerged.

The heirs of John Trigg, or those to whom he conveyed same, are the beneficiaries of the restoration. Accretions east of the Trigg lands must be accretions to Trigg's title as a riparian proprietor, for he did not lose this benefit because for a time his own lands were submerged or wasted by erosion. The new land forming where his land had been injured to him by virtue of his title to the bed upon which the accretion was deposited, but if the accretion extended beyond his original shore line, it became an addition to his firm land by the slow and imperceptible movement of his boundary calling for the river." (119 Fed. 832.)

This principle is announced in the case of *City of St. Louis v. Rutz*, 138 U. S. 226, 245; *Widdicombe v. Rosemiller*, 118 Fed. 295, and *Fowler v. Wood*, 73 Kan. 511, 85 Pac. 763, 117 Am. St. Rep. 534, 570, from head notes of the latter case, we quote the following:

"NAVIGABLE STREAMS—Avulsion. Reappearance of Submerged Land. If a navigable river suddenly encroaches upon adjoining private land, the title to the submerged portion remains in the former owner. When thereafter such land rises to the surface, whether by the deposit of alluvion or by a change in the channel of the stream, dominion reattaches thereto as if never suspended, and whatever accretions may have been added to the tract belong to its proprietor, as in ordinary cases." (117 Am. St. Rep. 534.)

If the right to recover submerged lands depended upon the principle of accretion, then where all of the land of a

riparian owner had been washed away, as in the case of the Trigg lands, and another, or interior, tract, had become the riparian tract, accretions to that tract would cut off the riparian owner when his lands reappeared, which is not the case.

Gilbert v. Eldridge, 47 Minn. 210.

Crandall v. Allen, 118 Mo. 403.

Ocean City Association v. Shriver, 64 N. J. L. 550.

Gale v. Kinzie, 80 Ill. 132.

In the case of *Hughes v. Birney's Heirs*, 107 La. 664, 32 So. 30, the Court held that the principles governing the acquisition of land by accretion or dereliction were not determinative of the controversy, though having bearing thereon. The fact that the land reappeared by accretion was not determinative in that case any more than in this. The syllabus prepared by the Court is as follows:

"1. It is held that the doctrine of reappearance of land after submergence is the one that controls the case, and that the principles governing the acquisition of land by accretion or dereliction are not directly determinative of the controversy though having a bearing upon the same.

2. If, after submergence, the water disappears from the land, either by gradual retirement or by the elevation of the land by natural or artificial means, and its identity can be established by reasonable marks, or by situation, extent, quantity, or boundary lines, the proprietorship returns to the original owner." (32 So. 30.)

In *Farnham on Waters*, Vol. 1, p. 331, the learned author, in footnote 1, says:

“If the sea swallow land, if the bounds can be ascertained, the owner may have them again if they are subsequently left to dry or are regained by him. And if the former extent of land can be known, it shall be returned to the owner.

Hale, de Jure Maris, Chap. 4.

Rolle's Abr. 168.

Sandars' Justinian, p. 169.

The former ownership of land submerged by the sea may be identified by mensuration, so that, if the sea suddenly swallow up 10 acres dry, the 10 acres may be reclaimed by admeasurement, but the locality must be proved. *Hall, Seashore*, 130. (*Farnham on Waters*, Vol. 1, p. 331.)

CONCLUSION.

We respectfully submit that the Supreme Court of Tennessee, in the case of *Muncie Pulp Company v. State*, 119 Tenn. 47, and Circuit Court of Appeals for the Sixth Circuit, in the case of *Stockley v. Cissna*, 119 Fed. 812, reached the right conclusion, and the principle applied in those cases is correct. Therefore, if this be true, then it follows, as pointed out in our original brief, that the center of the river bed of 1823-1835, as shown by Humphreys' map, is the boundary between the States along the abandoned channel of the river, and the commission should be so instructed.

Respectfully submitted,

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The Supreme Court of the United States

OCTOBER TERM, 1917.

THE STATE OF ARKANSAS, *Complainant,*

vs.

No. 4 Original

THE STATE OF TENNESSEE, *Respondent.*

In Equity.

BRIEF AND ARGUMENT ON BEHALF OF THE STATE OF TENNESSEE.

May It Please the Court:

STATEMENT OF THE CASE.

As stated by the learned counsel for the State of Arkansas, this cause involves the location of the boundary line between Arkansas and Tennessee, and is to be determined on stipulated facts.

Very briefly, the situation is this: Tennessee was admitted into the Union in 1796; Arkansas in 1836. The record does not disclose what changes, if any, in the course of the Mississippi River, which passes between the two States, occurred between the years 1796 and 1823. A map, designated as the "Humphreys' Map," Exhibit A to the answer of the State of Tennessee, opposite page 28 of the record, shows the conditions at the

locus in quo in 1823. It is agreed that this map exhibits the river as it ran in that year.

Record Page 40.

Between 1823 and March 7, 1876, the width of the channel had increased from its former width to that of one and one-quarter to one and one-half miles, by the erosion and caving in of the Tennessee bank south, southwest and west of Dean's Island, along the mainland and Island Thirty-seven. A steamboat reconnaissance was made by Colonel Suter, under the direction of the War Department of the United States in 1874, which map, showing the general situation as it existed about the time of the avulsion in 1876, is exhibited opposite page 4 of the original bill filed in this cause.

On March 7, 1876, "the river suddenly and with great violence, within about thirty hours, made for itself a new channel directly across the neck opposite the apex of Dean's Island; the old channel around the bend of the elbow was abandoned by the current of the river, but remained for a few years covered with dead water, becoming a lake or lagoon. It was no longer navigable, except in time of high water for small boats, and this continued only for a short time; the old bed immediately began to fill with sand, sediment and alluvial deposits, and bars formulated."

Record Pages 40-41.

So it is that from 1823 and before that time, to 1876 the main channel of the Mississippi River ran in the shape of a horseshoe around Devil's Elbow for a distance of approximately fifteen miles. The effect of the avulsion of 1876 was to form a new channel across the heel of the horseshoe, causing the old bed to become a

lake or lagoon, which, in the process of time, filled up, and is now dry land capable of cultivation.

Arkansas contends, first, that the middle of the channel of navigation at low stage as it existed prior to the avulsion, is, and should remain the true boundary line between the States of Arkansas and Tennessee; whereas, Tennessee contends that the true boundary line is, and should continue to be a line drawn along the abandoned bed of the river at a point equidistant between its well defined and principal banks at a normal stage of water.

Arkansas further contends that the avulsion of March 7, 1876, did not alter the boundary line as it existed just before the avulsion; but Tennessee contends that, as an effect of the avulsion was to cause the waters to recede from the old bed of the river, the result was to press back the boundary line to where it was in 1823, the date of the oldest record of the line since Tennessee was admitted to the Union.

Record Pages 41-42

BRIEF.

I.

The boundary between Arkansas and Tennessee is a line drawn along the middle of the Mississippi River at a point equidistant between its principal and well-defined banks, at a normal stage of water.

A.

The middle of the Mississippi River is the boundary.

1. The western boundary of the Colony of North Caro-

lina was in 1763, by treaty, fixed at a line "drawn along the middle of the Mississippi River."

3 *Jenkinson's Treaties* 177.

2. The western boundary of the United States, in the Treaty of Peace with Great Britain, was a line drawn along "the middle of the said River Mississippi."

Treaties and Conventions Between the United States and Other Powers Since July 4, 1776, Government Printing Office, Washington, 1889, P. 371.

3. The phrase "middle of the Mississippi River," was construed by the treaty between the United States and Spain in 1795 to mean the middle of the bed.

Treaties and Conventions supra, p. 1007.

4. The western boundary of North Carolina became the western boundary of Tennessee.

1 *Statutes* 491, *Chap. 47.*

5. North Carolina ceded all her territory west of a certain boundary to the United States in 1790, by a conveyance which was accepted by an Act of Congress passed April 2, 1790.

1 *Statutes* 106, *Chap. 6.*

6. By the Louisiana Purchase, concluded by treaty April 30, 1803, France ceded to the United States the Province of Louisiana, to the same extent that it was possessed by Spain on the 1st of October, 1800.

Treaties and Conventions supra, p. 331.

The Act admitting the State of Arkansas into the Union describes its eastern boundary as "the middle of the main channel of the Mississippi River."

5 *Statutes* 50, *Chap. 100.*

7. The western boundary of Tennessee is described in its Code as "the middle of the stream of the Mississippi River."

Shannon's Code, Sec. 80.

Code of 1858, Sec. 69.

B.

The rule of the thalweg should not be applied after a stream abandons its bed in which a boundary line is to be established.

While a boundary between conterminous States, in the absence of convention or treaty, may be in the middle of the main navigable channel, the boundary should become a line drawn along the middle of the bed, at a point equidistant from the permanent and well-established banks after the water runs out of the bed of the abandoned river, and this because the reason for the rule of the thalweg, namely, the preservation of rights of equality in navigation and fishery, does not exist after the stream runs dry.

Iowa v. Illinois, 147 U. S. 1.

Louisiana v. Mississippi, 202 U. S. 1, 49.

Chitty's Vattel, 4 Am. Ed. p. 156.

1 *Moore Int. Law Dig.*, Sec. 156.

8 *Opins. of Attorneys General*, pp. 177, 178.

Almeda, Derecho Publico, Tom 1, p. 199.

Nebraska v. Iowa, 143 U. S. 359.

Sandars' Justinian, 1 Am. Ed. pp. 168, 169.

Missouri v. Nebraska, 196 U. S. 23, 36.

Buttenuth v. St. Louis Brick Co., 123 Ill. 535.

Nugent v. Mallory, 141 S. W. 850, 145 Ky. 824.

C.

1. *The boundary is an ancient one, established by interpretation, acquiescence and prescription.*

By the treaties between the United States and Spain in 1795, the boundary line was interpreted as being the *medium fillum aquae*.

Treaties and Conventions Concluded Between the United States and Other Powers supra, p. 1007.

2. Congress had no power to include within the territory of Arkansas, through the enabling Act admitting it to the Union, territory within the boundaries of Tennessee, because Tennessee was the older State.

Constitution of the United States, Art. 4, Sec. 3.

Louisiana v. Mississippi, 202 U. S. 40.

Washington v. Oregon, 211 U. S. 127, 134.

3. Arkansas has interpreted the line to be at a point equidistant from the well-defined and permanent banks of the Mississippi River.

Cessill v. State of Arkansas, 40 Ark. 501.

Wolfe v. State, 104 Ark. 140.

Kinnane v. State, 106 Ark. 286.

Hearne v. State, 181 S. W. 291.

4. Tennessee has recognized the same boundary, and acquiesced therein.

Moss v. Gibbs, 10 Heisk. 283.

Foppiano v. Snead, 113 Tenn. 167.

State v. Pulp Co., 119 Tenn. 47, 73.

5. Where a State has for many years exercised undisturbed jurisdiction over a particular territory, a prescriptive right arises, which is equally binding under principles of justice on States as well as individuals.

Rhode Island v. Massachusetts, 4 How. 639.

Indiana v. Kentucky, 136 U. S. 510.

Virginia v. Tennessee, 148 U. S. 523.

Louisiana v. Mississippi, 202 U. S. 53.

Maryland v. West Virginia, 217 U. S. 1, 41.

Missouri v. Kansas, 213 U. S. 78, 85.

D.

The line if fixed at the fillum aquae should be determined with reference to the normal stage of water.

9 C. J. Tit. *Boundaries*, Sec. 76, p. 193.

Words and Phrases, Tit. *Thread of a Stream*.

State v. Burton, 106 La. 732, 731, Sec. 291.

Hopkins Academy v. Dickson, 9 Cush. (Mass.) pp. 544, 552.

Warren v. Inhabitants of Thomaston, 75 Me. 329, 332, 46 Am. Reps. 397.

Cessill v. State, 40 Ark. 501.

State v. Pulp Co., 119 Tenn. p. 47.

Farnham, Sec. 417, p. 1462.

II.

Since the avulsion of 1876 caused the old river bed to dry up, old lines should be re-established, and this by applying the doctrine of submergence and reappearance of land.

A.

The effect of avulsion is to leave the boundary in the abandoned bed of a stream, and it does not carry the boundary to the new channel.

Missouri v. Nebraska, 196 U. S. 33.

State v. Pulp Co., 119 Tenn. 47.

Stockley v. Cissna, 119 Tenn. 135.

B.

The doctrine of submergence and reappearance of land applies where lands have been submerged and the bed becomes dry, and old boundaries can be located or distinguished.

State v. Pulp Co., 119 Tenn. 47.

Sir Matthew Hale's De Jure Maris, repr. Har-
graves Law Tracts 36, 37.

- 7 *Comyns Dig. Tit. Prerogative*, D. 61.
 5 *Bacon's Abridgment*, Tit. Prerogative, p. 495.
Mulry v. Norton, 100 N. Y. 424.
Morris v. Brook, repr. Am. Reps. 206.
St. Louis v. Rutz, 138 U. S. 226.
Stockley v. Cissna, 119 Fed. 812.
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City of Chicago v. Lord, 169 Ill. 392, 48 N. E. 927.
 38 L. R. A. 849, 61 Am. S. Reps. 181.
Widicombe v. Rosemiller, 118 Fed. 295.
Randolph v. Hinck, 115 N. E. (Ill.) 182.

C.

In boundary disputes between nations the same rules will be applied as apply between individuals.

- Trustees v. Hopkins*, 8 Porter 9.
Nebraska v. Iowa, 143 U. S. 359.
Opins. of Attorneys General, Vol. 8, p. 175.

ARGUMENT.

The boundary between Arkansas and Tennessee is a line drawn along the middle of the Mississippi River at a point equidistant between its principal and well defined banks at a normal stage of water.

A.

The middle of the River Mississippi is the boundary.

By a treaty between Great Britain, France and Spain, made in February, 1763, the western boundary of the colony of North Carolina was fixed at a line "drawn along the middle of the Mississippi River."

3 *Jenkinson's Treaties* 177.

In the treaty of peace between Great Britain and the United States made November 30, 1782, the western boundary of the United States is thus described:

“Thence by a line to be drawn along the middle of the said River Mississippi until it shall intersect the northernmost part of the 31st degree of north latitude.”

Treaties and Conventions Between the United States and Other Powers Since July 4, 1776, Government Printing Office, Washington, 1889, p. 371.

The phrase “middle of the Mississippi River” was construed and interpreted in a treaty between the United States and Spain, concluded October 27, 1795, Article IV. of which provides:

“It is likewise agreed that the western boundary of the United States which separates them from the Spanish Colony of Louisiana is in the middle of the channel or *bed* of the Mississippi River, from the northernmost boundary of said States to the completion of the 31st degree of latitude north of the equator.” (Italics ours.)

Treaties and Conventions Between the United States and Other Powers supra, p. 1007.

The western boundary of North Carolina became the western boundary of Tennessee on the admission of Tennessee to the Union in 1796.

1 *Statutes* 491, *Chap.* 47.

For North Carolina ceded all of her territory west of a certain boundary to the United States on February 25, 1790, by a conveyance which was accepted by an Act of Congress passed for that purpose April 2, 1790.

1 *Statutes* 106, *Chap.* 6.

By the Louisiana Purchase, concluded by treaty April 30, 1803, France ceded to the United States the Colony or Province of Louisiana, to the same extent that it was possessed by Spain on the 1st of October, 1800.

Treaties and Conventions Between the United States and Other Powers supra, p. 331.

The Act admitting the State of Arkansas into the Union describes its eastern boundary as "the middle of the main channel of the Mississippi River."

5 Stat. 50, Chap. 100.

The western boundary of Tennessee thus became as described in the Tennessee Code, "the middle of the stream of the Mississippi River" (Shannon's Code, Sec. 80; Code of 1858, Sec. 69), while the eastern boundary of Arkansas became "the middle of the main channel of the Mississippi River."

B.

The rule of the thalweg should not be applied after a stream abandons its bed in which a boundary is to be established.

If we understand the position of learned adversary counsel, it is that these phrases, "the middle of the stream of the Mississippi River," "the middle of the Mississippi River," and "the middle of the main channel of the Mississippi River," should be construed to mean the middle of the main channel of navigation, and they rely on a line of authorities, chief of which is *Iowa v. Illinois*, 147 U. S. 1. In the last mentioned case it was said:

"When a navigable river constitutes the boundary between two independent States, the line defining the point at which the jurisdiction of the two separates

is well established to be the middle of the main channel of the stream. The interest of each State in the navigation of the river admits of no other line."

The Court, reviewing the opinions of jurists, writers on international law, and cases adjudging international right, declared that the controlling consideration in such matter is that which preserves to each State equality in the right of navigation in the river; and in *Louisiana v. Mississippi*, 202 U. S. 1, 49, it was said that the rule of the thalweg was stated and applied in the case of *Iowa v. Illinois*, *supra*.

The term "thalweg" was held to mean the middle or deepest or most navigable channel, and to mean the same as fairway or midway or main channel.

"Thalweg literally means the deep way or most navigable channel, and refers to the course ordinarily taken by vessels proceeding downstream, that is, in the current or channel, as distinguished from the course upstream, which naturally avails itself of the slack water of the flats."

15 *R. C. L. Tit. Intl. Law*, Sec. 27.

Whatever may be the true construction of the case of *Iowa v. Illinois*, *supra*, and *Mississippi v. Louisiana*, *supra*, it is the contention of Tennessee that these cases (exemplifying as they do the rule that when a river is a boundary between conterminous States, and in the absence of compact, convention or other circumstances taking the case out of the general rule, the middle of the main navigable channel of such river marks the true boundary), should not control the instant case, because the reason for the rule has ceased to exist under the state of facts which we have before us.

The controlling consideration in the decision of *Iowa*

c. Illinois was held by the Court to be the preservation of equality of navigation, based on broad principles of international right. In the instant case we are dealing with the abandoned bed of a river over which no water flows, and the reason for the rule having ceased, it is our insistence that the rule itself should not be applied.

It is said by Vattel:

“But if, instead of a gradual and progressive change of its bed, the river, by an accident merely natural, turns entirely out of its course and runs into one of the two neighboring States, the bed which it has abandoned becomes thenceforward their boundary and remains the property of the former owner of the river, the river itself, as it were, annihilated in all that part, while it is reproduced in its new bed, and there belongs only to the State in which it flows.

This case is very different from that of a river which changes its course without going out of the same State. The latter in its new course continues to belong to its former owner, whether that owner be the State or any individual to whom the State has given it; because rivers belong to the public, in whatever part of the country they flow. *Of the bed which it has abandoned, a moiety accrues to the contiguous lands on each side, if they are lands that have natural boundaries with the right of alluvium.*” (Italics ours.)

Chitty's Vattel, 4 Am. Ed. p. 121.

“When a river is the line of arcifinious boundary between two nations, by a treaty, its natural channel so continues, notwithstanding any changes of its course by accretion or decrection of either bank; but if the course be changed abruptly into a new bed by eruption or avulsion, then the *river bed* becomes the boundary.” (Italics ours.)

1 *Moore Int. Law Dig.*, Sec. 156.

Replying to a query as to what would be the true boundary should the *Rio Bravo* desert its original channel and force for itself a new channel in another direction, Mr. Attorney General Cushing said:

"But, on the other hand, if, deserting its original bed, the river forces for itself a new channel in another direction, then the nation, through whose territory it thus breaks its way, suffers injury by the loss of territory greater than the benefit of retaining the natural river boundary, and that boundary remains in the *middle of the deserted river bed*, for, in truth, just as a stone pillar constitutes a boundary, not because it is stone, but because of the place in which it stands, so a river is made the limit of nations, not because it is running water bearing a certain geographical name, but because it is water flowing in a given channel and within given banks which are the real international boundary." (Italics ours.)

8 Opinions of Attorneys General, pp. 177, 178.

In the same opinion, quoting from *Alameda, Derecho Publico* Tom 1, p. 199, it was said:

"As the river belongs to the two nations, so also the river bed, if by chance it becomes dry, *is divided between them as proprietors*. When the river changes its course, throwing itself on one of two conterminous States, it then comes to belong to the State through whose territory it runs, all community of right in it so far ceasing." (Italics ours.)

This opinion was quoted with approval in the case of *Nebraska v. Iowa*, 143 U. S. 359, in which it was said by Mr. Justice Brewer, in applying the authorities reviewed:

"Beyond doubt, that accretion on an ordinary river would leave the boundary between two States the varying center of the channel, and that avulsion would establish a fixed boundary, to-wit, *the center of the abandoned channel*." (Italics ours.)

This rule comes to us from the Roman law, for in the Institutes of Justinian it is written:

"If a river, entirely forsaking its natural channel, begins to flow in another direction, the old bed of the river belongs to those who possess the lands adjoining its banks, in proportion to the extent that their respective estates adjoin the banks. The new bed follows the condition of the river, that is, it becomes public, and, if after some time the river returns to its former channel, the new bed again becomes the property of those who possess the lands contiguous to its banks."

Sandars' Justinian, 1 Am. Ed. pp. 168, 169.

In *Missouri v. Nebraska*, 196 U. S. 23, 36, after reviewing the old authorities, it was held, Mr. Justice Harlan writing:

"Manifestly, these observations cover the present case, and make it clear that the boundary line between Missouri and Nebraska, in the vicinity of Island Precinct, cannot be taken to be the middle of the channel of the Missouri River, as it has been since the avulsion of 1867, and now is, but must be taken to be the middle of the channel of the river as it was prior to such avulsion."

And this notwithstanding that no water flowed through the original channel.

It appears from the concluding paragraph of the opinion that there was no doubt in the mind of the Court but that this line should be drawn at a point in the bed of the river equidistant from the original banks, for it is said:

"It appears from the record that about the year 1895 the county surveyors of Nemaha County, Nebraska, and Atchison County, Missouri, made surveys of the abandoned bed of the Missouri River, in the locality herein mentioned, ascertaining the loca-

tion of the original banks of the river on either side, and to some extent marked the middle of the old channel. If the two States agree upon these surveys and locations as correctly marking the original banks of the river and the middle of the old channel, the Court will, by decree, give effect to that agreement; or, if either State desires a new survey, the Court will order one to be made and cause monuments to be placed so as to permanently mark the boundary line between the two States."

In *Buttenth v. Louis Brick Co.*, 123 Ill. 535, it was held that the middle of the main channel of the river meant the center of the channel of navigation.

"But, if the river should suddenly change its course, or desert the original channel, the rule of law is, the boundary remains *in the middle of the deserted river bed.*" (Italics ours.)

In *Nugent et al. v. Mallory et al.*, 141 S. W. 850, 145 Ky. 824, it was held:

"Where a channel between an island and the mainland opposite was filled up, the boundaries of the owners of the island and of the mainland will be extended to the middle of the channel as it originally ran, or to the middle of the accretion, if the channel is completely filled."

It is the contention of Tennessee that this rule is the only equitable rule which can be applied on the abandonment of its bed by a river, in that it gives to each of the adjoining States an equal moiety in the lands abandoned by the stream.

As long as water flows over the bed of a navigable stream, considerations of international policy may well support the rule that the boundary in such stream is along the thalweg or fairway, and this because the pres-

ervation of equality in the navigation of the river is of extreme importance to the nations bounded by such stream.

The river is owned jointly by the two adjoining nations, and the purpose of the rule is to secure to both equal rights in the stream, the superlative one being the right of navigation; but when the water leaves its bed and establishes for itself a new channel, we respectfully urge that principles of equity, equality and right constrain the application of a new principle, which will give to each of the adjoining States an equal moiety in the land over which the water ran, and which is, by the abandonment of the stream, rendered fit for cultivation and use.

The boundary is an ancient one established by interpretation, acquiescence and prescription.

It is next insisted by Tennessee that the line should be run at a point equidistant between well-defined banks, at a normal stage of water, because this has been the long-established boundary, acquiesced in by both Arkansas and Tennessee and their predecessors in sovereignty for many years.

Whatever may have been the proper construction of the treaties of 1763 and 1782, *supra*, it is clear that on the admission of Tennessee into the Union the western boundary of the United States was construed to be the "middle of the channel *or bed*" (italics ours) of the Mississippi River. It was so fixed by the treaty between the United States and Spain in 1795.

Treaties and Conventions Concluded Between the United States and Other Powers, supra, p. 1007.

In the Act admitting the State of Arkansas into the

Union, in describing the eastern boundary of Arkansas as "the middle of the main channel of the Mississippi River," it could not have been the intention of Congress by using such phrase to change the western boundary of Tennessee as it then existed, because Congress was without power to change the boundaries of Tennessee as they were fixed when it was admitted into the Union in 1796.

Constitution of the United States, Art. IV., Sec. 3.

Louisiana v. Mississippi, 202 U. S. 40.

Washington v. Oregon, 211 U. S. 127, 134.

After the admission of Tennessee and Arkansas into the Union, both States considered that the boundary line was a point equidistant from the well-defined banks of the Mississippi River, at a normal stage of water. It has always been so considered by Arkansas. The question was presented for judicial determination in *Cessill v. State of Arkansas*, 40 Ark. 501. In this case, appellant was convicted of selling liquors without a license. The sales were made on a boat permanently anchored on the Mississippi River, off the Arkansas shore, opposite Mississippi County. The theory of the defense was that the spot was not in Arkansas. The defendant contended that "the middle of the main channel" meant the middle of that channel bearing the commerce of the river, or the middle of the main navigable channel. An elaborate opinion was written by Mr. Justice Eakin, holding that the eastern boundary of Arkansas was to be fixed at a point equidistant between the well-defined banks of the stream, and not at a point in the middle of the main navigable channel as it then existed. Said the Court:

"The channel of the river, bay or sound, is, in boatman's parlance, the course over its bed along which the water is deepest and the navigation safest. This may be irrespective of the current or distance

from the shore. In questions of geography or boundaries, however, it is more generally used to designate the depression of a bed between permanent banks, forming a conduit along which water flows, and which may be at some times full, and at others nearly if not quite dry. In this sense it is of common use in law. It is the more obvious signification in connection with boundaries, inasmuch as it presents something of a permanent nature, or at least at all times visible; and when changed, leaving traces of the old landmarks. In this sense we speak of Bayous Bartholomew and Atchafalaya as old channels of the Arkansas and Red Rivers. They have permanent features independent of water; whereas channels, in the sense of the river pilot, are ever shifting, invisible, discoverable only by patient soundings, and then imperfectly. We cannot suppose that such channels would be adopted as State boundaries, or as references to determine them."

In commenting on the fact that the boundary line in question was a very old one, and did not concern alone Arkansas, the Court continued:

"It originated with the treaty between England, France and Spain in February, 1763, which made the middle of the Mississippi River the boundary between the British and French territories. This line has been ever since observed in subsequent treaties, in Federal legislation, in State constitutions and judicial decisions, and there are not lacking unmistakable indications of the meaning of the middle of the river. For instance, in the treaty between the United States and Spain, in October, 1795, before our purchase of Louisiana, the fourth article provides: 'That the western boundary of the United States, which separates them from the Spanish Colony of Louisiana, is in the middle of the channel or bed of the River Mississippi, from the northern boundary of said States at the completion of the 31st degree of latitude north of the Equator.' "

In *Wolfe v. State*, 104 Ark. 140, Mr. Norwood, the learned Attorney General of Arkansas who filed the bill, took the position that the boundary line between Arkansas and Tennessee is a point equidistant from the principal or well-defined banks of the Mississippi River, in which he was sustained by the Court, the Court again reaffirming the doctrine announced in the case of *Cessill v. State, supra*.

In *Kinnane v. State*, 106 Ark. 286, the learned Attorney General again contended for the same rule, and the Court again decided that the eastern boundary of Mississippi County, Arkansas, is the midway line between the principal banks of the Mississippi River on the Arkansas and Tennessee sides, and affirmed the principle that the Arkansas court had jurisdiction to dispose of the case.

As late as 1915, Arkansas still adhered to the rule announced in *Cessill v. State*, in the case of *Hearne v. State*, 181 S. W. 291. Concerning the line, the Court said:

"In *Kinnane v. State*, 106 Ark. 286, 153 S. W. 262, this court approved an instruction relative to the boundary line between the States of Arkansas and Tennessee, declaring the law in effect as given in said instruction numbered one, and quoted in the opinion the holding and declaration of the Supreme Court of the State of Tennessee in *Tennessee v. Muncie Pulp Co.*, 119 Tenn. 47, 104 S. W. 437, of like effect, recognizing the boundary between the States to be as declared by the Supreme Court of Arkansas. If no error was committed in the refusal of the said requested instruction numbered four and others of like kind, for the State of Tennessee is making no claim of title herein to the territory upon which the offense was shown to have been committed, and as held in *Tennessee v. Muncie Pulp Co., supra*, the States having agreed upon the true and correct line

separating their territory, as announced in said instruction numbered one, others cannot be heard to complain."

In *Hearne v. State*, a murder was committed on Island No. 37 in the Mississippi River, which is part of the territory which Tennessee contends is within its jurisdiction in this suit, reference being made to Exhibit A to the Answer and Cross Bill of Tennessee.

Tennessee has recognized the boundary to be as declared in the Arkansas case of *Cessill v. State*, decided more than thirty years ago. As early as 1869 Justice Nicholson, in delivering the opinion of the court in the case of *Moss v. Gibbs*, 10 Heisk. 283, said:

"By the treaty of 1763 between France, Spain and England, the middle of the Mississippi River was made the dividing line between the British and French territories on this continent."

It is evident from a study of the opinion that the phrases, "middle of the river" and "middle of the main channel of the river," are used as synonymous terms to designate the center of the bed of the main stream of the river, measuring from one well-defined bank to the other, and not the "channel of navigation."

In *Foppiano v. Snead*, 113 Tenn. 167, Justice Neill said:

"The center of the Mississippi River is the line between Tennessee and Arkansas."

In *State v. Pulp Co.*, 119 Tenn. 47, 73, the Court quoted extensively from *Cessill v. State*, 40 Ark. 504, and approved what was therein said by Mr. Justice Eakin in deciding that case. Said the court, at page 77:

"We concur fully with the Supreme Court of Arkansas in the construction given the Treaties of 1763 and 1783 in that opinion, and hold, as held by that court, that the boundary line between the British possessions in America, which then included all the territory now composing the States bordering upon and having for their western boundary the Mississippi River, and the territory of Louisiana then belonging to Spain, was fixed and defined as a line along the middle of the main channel of the river equidistant from the visible and permanent banks confining its waters, and that the several Acts of Congress admitting into the Union the States lying upon both sides of the river at various times, in calling for the middle of the river and the middle of the main channel or stream of the river, had reference to these treaties, and must be construed to mean the same thing."

On the question of acquiescence, the Tennessee court, beginning at page 78, had this to say:

"The general understanding of the people and constituted authorities of Tennessee has been, and is, that the line separating the State from Arkansas is as defined in the case of *Cessill v. State, supra*. This appears from an Act of the General Assembly of the State approved April 15, 1903 (Chap. 420, p. 1215, Acts of 1903), in which the lands in controversy and all others lying upon the Tennessee side of the middle of the old bed of the river are declared to be the property of the State, and the Government authorized to appoint commissioners, to act with other commissioners to be appointed by the State of Arkansas, to run and mark the line, and also to report to the Governor the extent and value of such lands.

The General Assembly of Arkansas passed a similar Act (Chap. —, p. —, Acts of —), but it was vetoed by the Governor of that State, and therefore no commissioners were appointed under the Act

passed by the Legislature of Tennessee. This suit was brought by direction of the Governor of this State, and is not only an acquiescence in the boundary line, as defined by the authorities of Arkansas, but an assertion of jurisdiction up to that line and title of property within it. We think, whatever may be the construction of the treaties defining this great boundary line, or the Acts of Congress admitting other States bordering upon it, that the concurrence of Tennessee and Arkansas in the interpretation of the treaties and legislation affecting their boundary line is effective between them and controlling in this and other cases involving the question."

It will thus be seen that the boundary between Arkansas and Tennessee has been agreed upon and judicially determined by both States, and acquiesced in by both for a long period of time.

The rule is well settled that where a State has for many years exercised undisturbed jurisdiction over a particular territory, a prescriptive right arises, which is equally binding, under principles of justice, on States as well as individuals.

In the case of *Rhode Island v. Massachusetts*, 4 How. 639, the Court said:

"Surely this, connected with the lapse of time, must remove all doubts as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change, and this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with lapse of time and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is protected, and there is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary."

In *Indiana v. Kentucky*, 136 U. S. p. 510, the Court said:

"It is a principle of public law, universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority."

In *Virginia v. Tennessee*, 148 U. S. at page 523, the Court said:

"Independently of any effect due to the compact as such, a boundary line between States or Provinces, as between private persons, which has been run out, located and marked upon the earth, and afterward recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant; and the line so established takes effect not as an alienation of territory, but as a definition of the true and ancient boundary."

In *Louisiana v. Mississippi*, 202 U. S. p. 53, the Court said:

"The question is one of boundary, and this court has many times held that, as between the States of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive, whatever the international rule might be in respect of the acquisition by prescription of large tracts of country claimed by both."

In *Maryland v. West Virginia*, 217 U. S. 1, 41, the Court said:

"A perusal of the record satisfies us that for many years occupation and conveyance of the lands on the Virginia side has been with reference to the Deakin's line as the boundary line. The people have

generally accepted it and have adopted it, and the facts in this connection cannot be ignored."

After quoting from *Vattel* on the *Law of Nations*, Sec. 49, *Wheaton on International Law*, Sec. 164, and the cases from the Supreme Court, the Court continues, at page 44:

"The application of these principles cannot permit us to ignore the conduct of the States and the belief of the people concerning the purpose of the boundary line known as the Old State, or Deakin's line, and to which their deeds call as the boundary of their farms, in recognition of which they have established their allegiance as citizens of the State of West Virginia, and in accordance to which they have fixed their homes and habitations.

True it is, that after the running of the Deakin's line certain steps were taken, intended to provide a more effectual legal settlement and delineation of the boundary, but none of these steps were effectual, or such as to disturb the continued possession of the people claiming rights up to the boundary line.

The effect to be given to such facts as long-continued possession 'gradually ripening into that condition which is in conformity with international order,' depends upon the merit of individual cases as they arose. 1 *Oppenheim Intl. Law*, Sec. 243.

In this case we think a right, in its nature prescriptive, has arisen, practically undisturbed for many years, not to be overthrown without doing violence to the principles of established rights and justice, equally binding upon States and individuals."

So, it was said in *Missouri v. Kansas*, 213 U. S. 78, 85, concerning contemporaneous and long-continued construction by the States of Missouri and Kansas, that the middle channel of the Missouri River formed the boundary line between the States:

"That this was understood by Missouri to be the effect of the Act is shown by a succession of statutes declaring the boundaries of the river counties in this part. They all adopted the middle of the main channel of the river, beginning with the Act that organized the County of Platte, approved December 31, 1838, Missouri Laws, 1838, pages 23-25 (and citing other acts). It is confirmed by the cases of *Cooley v. Goldman*, 52 Mo. App. 229, and *St. Joseph and G. I. R. Company v. Derereaux*, 41 Fed. 14, both of which cases noticed that the Act extended the boundary to the river, and not merely to the bank." (Page 85.)

In the case at bar, therefore, we find both States agreeing on the location of the boundary between them, and the exercise of jurisdiction by each up to that line for many years. It was not until the filing of the bill in this case that either one of the States attempted to establish any line other than a line equidistant from the principal and well-established banks of the great river. It is the contention of Tennessee that this construction and long acquiescence by both States in the line, and the exercise of jurisdiction by each up to that line, has forever settled the question, as no one rightfully entitled to do so is complaining.

The line is to be determined with reference to a normal stage of water.

As before stated, Tennessee contends that the line should be run along the middle of the bed at a point equidistant between the principal and well defined banks of the former stream. This is the line known to the old law writers as the *medium fillum aquae*, and where the boundary is the *fillum aquae* the center or thread of the stream must necessarily be determined with reference to the well defined and established banks of the stream at a normal stage of water.

"The thread of a stream is the line midway between the opposite shore lines, when the water is in its natural and ordinary stage, at medium height, and neither swollen by freshets nor shrunk by drouths. In locating the thread, no account is taken of the main channel or current, nor of the lowest and deepest point of the stream."

9 C. J. Tit. *Boundaries*, Sec. 76, p. 193.

"The thread of a stream is the middle line of a channel; that is, of the hollow bed of running water, when the water is at its ordinary stages."

Words and Phrases (O. S.) Tit. Thread of a Stream.

State v. Burton, 106 La. 732, 31 S. 291.

Hopkins' Academy v. Dickinson, 9 Cush. (Mass.) 544, 552.

Warren v. Inhabitants of Thomaston, 75 Me. 329, 332, 46 Am. Reps. 397.

In a river such as the Mississippi, the only fair and just method of determining where the line should be, if the rule of *fillum aquae* is to apply, would be to take the stream at an ordinary stage. Periodically, the Mississippi rises to great heights, which would, in the absence of our levee system, flood large portions of the lowlands adjacent to the river; nor would it be equitable to run the line at the lowest stage of water which the river obtains, because periodically the river descends far below its permanent and well established banks.

And further, it occurs to us that the only banks intended by use of the phrase, "permanent and well established banks," are those banks which confine the waters of the river when it is at its normal, usual and ordinary stage. It is pointed out by Farnham, in his work on Waters, Sec. 417, p. 1462:

"The bed of the river is a definite and commonly a permanent channel, and consists of soil which is permanently submerged by the water. The banks of the stream are the elevations of land which confine the waters to their natural channel when they rise to the highest point in which they are still confined to a definite course and channel. The channel is the passageway between the banks through which the water of the stream flows."

Tennessee further contends that both States, Arkansas in its decision in *Cessill v. State, supra*, and subsequent cases, and Tennessee in its decision in *State v. Pulp Company, supra*, have agreed that the center line in the bed of the stream should be located with reference to the permanent and well established banks, taking them at the natural and ordinary stage of water, at medium height, neither swollen by freshets nor shrunk by drouths.

So, Tennessee contends, first, that the boundary line between it and Arkansas should be held to be along the line in the middle of the abandoned bed or channel, at a point equidistant from the principal or well-established banks, because the bed of the stream is now dry land, and the reason for the rule of international law, if such be the rule, establishing the boundary along the fairway or thalweg, has ceased to exist; secondly, because such a line has been agreed on between the States, acquiesced in by them for a long period of time, and each has exercised and continues to exercise jurisdiction up to such line.

II.

Since the avulsion of 1876 caused the old river bed to dry up, old lines should be re-established and this by applying the doctrine of submergence and reappearance of land.

If we understand the insistence of adversary counsel, it is that the avulsion of March 7, 1876, left the boundary line the center of the main navigable channel, as it existed just prior to the avulsion. Tennessee contends that the effect of it was to press back the line of the State to where it was when the boundary was originally fixed on the admission of the State to the Union or as near thereto as may be in view of the lapse of years.

In other words, Arkansas contends that the only effect of the avulsion was to leave the boundary the center of the main navigable channel, as it was just before the avulsion, while Tennessee contends that as a result of the avulsion the abandoned bed of the river went dry, and that on the happening of this event, the old lines, as they existed in the earliest record we have thereof, to-wit, 1823, were re-established.

A.

Effect of avulsion was to leave boundary in abandoned bed of stream.

Learned adversary counsel have cited a long line of cases, at page 16 of their brief, on the proposition that avulsion does not work any change in the boundary, which remains as it was before the avulsion. We have read these cases, which contain general language such as is used by this Honorable Court in *Missouri v. Nebraska*, 196 U. S. 33, as follows:

“Avulsion is the sudden and rapid change in the course of the channel of the boundary river. It does not work any change in the boundary, which remains as it was—in the center of the old channel—although no water may flow therein.”

Similar language was used by the Supreme Court of

Tennessee in the case of *State v. Pulp Company*, 119 Tenn. 47, and *Stockley v. Cissna*, 119 Tenn. 135.

In some of the cases cited by learned adversaries, it was sought to be established that where a boundary was fixed as the center or the middle of a stream, or the main channel thereof, a sudden and perceptible change of channel carried with it the boundary.

We concede, and entirely agree with learned adversaries that the effect of the avulsion of 1876 was not to carry the boundary line between Arkansas and Tennessee into the new channel in Centennial Cut-Off, across the heel of the Horseshoe, referred to in our statement of facts, but that the boundary remained and still is in the abandoned bed of the old channel around the bend. And this, we contend, is all that is meant by the language of the cases cited.

B.

The doctrine of submergence and reappearance of land applies, and old boundaries are re-established.

But learned adversaries contend that the doctrine of reliction is inapplicable to avulsion, as held by the Supreme Court of Tennessee in *State v. Muncie Pulp Co.*, 119 Tenn. 47; so, while we are agreeing that the avulsion did not carry the boundary line into the new channel, we differ as to the effect of the reappearance of dry land in the old or abandoned bed of the river.

It is agreed that by the avulsion of 1876 a new channel was made across the heel of the bend; "that the old channel around the bend of the elbow was abandoned by the current of the river, but remained for a few years covered with dead water, becoming a lake or lagoon. It was no longer navigable, except in time of high water for

small boats, which continued only for a short time; and the old bed immediately began to fill with sand and alluvial deposits." But it was not until several years that the old bed became dry and fit for cultivation and occupation."

Record Page 40.

It must be borne in mind that between 1823 and 1876 the river had moved southwardly and westwardly for a considerable distance into Tennessee territory, through erosion and caving in of the banks on the Tennessee shore, destroying large parts of grants along the banks made by the State of Tennessee to certain persons designated in the Humphreys plat, marked "Exhibit A" to Tennessee's Answer and Cross Bill.

If we understand the opinion of the Court, it was held in *State v. Pulp Co.*, 119 Tenn. 47, that when the waters in the old bed of the river receded and the submerged land lying therein reappeared, the effect was to put the boundary between the States back as it existed in 1823 and 1836, and this by virtue of the application of the doctrine of reliction, the Court citing *Mulry v. Norton*, 100 N. Y. 426, 3 N. E. 585, 53 Am. Reps. 206; *Morris v. Brooke*, Del. Com. Pleas, cited in *Mulry v. Norton*; *Hughes et al. v. Heirs of Burney et al.*, 107 La. 664, 32 So. 30; *St. Louis v. Rutz*, 138 U. S. 226, 246, 11 Sup. Ct. 337, 34 Law Ed. 941; *Stockley v. Cissna*, 119 Fed. 831, 56 C. C. A. 324, and other authorities.

As before stated, the Court names the doctrine of reliction, which, while technically correct, we apprehend is misunderstood by learned adversaries.

Reliction is defined by the Century Dictionary as coming from the Latin "relinquo," meaning "to relinquish, to leave behind." "In law," says the dictionary, "it

means 'the recession of the sea or other body of water from land.' "

"Reliction (Lat. *relinquo*, to leave behind), an increase of the land by the retreat or recession of the sea or a river."

Bouvier's L. Dict., Vol. 3, p. 2865.

On the other hand, "reliction" is the term sometimes applied to the process of the *gradual* recession of a body of water from land, and is an opposite to "accretion," which is a gradual and imperceptible addition to land by the action of a body of water in depositing indefinitely small particles of sand or earth thereon; while "reliction" is the gradual and imperceptible recession of the water, which has the effect of gradually and imperceptibly leaving the old bed or shore dry.

1 *Farnham on Waters*, p. 320.

We apprehend that the doctrine applied by the Tennessee Supreme Court might be more definitively stated as the doctrine of submergence and reappearance of land.

The learned Sir Matthew Hale, in his work *De Jure Maris et Brachiorum Ejusdem*, reprinted in *Hargraves' Law Tracts*, and the first four chapters of which are reprinted in the note to *In Re Jennings*, 6 Cow. (N. Y.) 518, 536, and chapters 5 and 6 in a note to *Mather v. Chapman*, 16 Am. Rep. 54, says:

"If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it, or though the marks be defaced, yet if by situation and extent of quantity and bounding upon the firm land, the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject does not lose his property; and accordingly it was held by Cooke and Foster, M. (7

Jac. C. B.), 'though the inundation continued forty years.' * * * But if it be freely left again by the reflex and recess of the sea, the owner may have his land as before, if he can make it out where and what it was; for he cannot lose his proprietorship of the soil, though it be for a time become part of the sea and within the admiral jurisdiction while it so continues."

This was the rule of common law, as laid down by the early abridgers. In 7 *Comyns' Digest*, *Tit. Prerogative*, D. 61, it was said:

"So, land derelict by the sea, belongs to the King by his prerogative, for when the dominion and soil of the British sea belong to him, the derelict land by consequence shall be his.

But if the sea overflows the land of any person, and after forty years flows back again, the owner shall have the land, and not the King." *Same*, D. 62.

So it is said in 5 *Bacon's Abridgement*, *Tit. Prerogative*, p. 495:

"If land be drowned, and so continue for divers years, if it be after regained, every owner shall have his interest again, if it can be known by the boundaries."

Hargraves' Law Tracts 36, 37.

The statement from *de jure maris* is quoted in *Mulry v. Norton*, 100 N. Y. 424 at page 436 et seq. to sustain the decision in that case, which was, in turn, relied on by the Supreme Court of Tennessee in arriving at its conclusion. In that case said the Court, at page 433:

"It is undoubtedly true that the proprietorship of lands may be lost by erosion or submergence, the one consisting of a gradual eating away of the soil by the operation of currents or tides, and the other of its disappearance under the water and the forma-

tion of a navigable body over it. The plaintiff's grantors have at all times since 1684 remained the owners and occupants of the mainland adjacent to the beach in dispute, and as such owners have been entitled to the rights which attend the title of littoral or riparian owners. 'They would be entitled to whatever should be gained from the sea by alluvium or dereliction, and their title was liable to be lost by the advance of high water marks, bringing their lands within the ebb and flow of the tide' (citing cases).

It is not, however, every disappearance of land by erosions or submergence that destroys the title of the true owner or enables another to acquire it, for the erosions must be accompanied by a transportation of the land beyond the owner's boundary to effect that result, or the submergence followed by such a lapse of time as will preclude the identity of the property from being established upon its reliction. Land lost by submergence may be regained by reliction, and its disappearance by erosion may be returned by accretion, upon which the ownership temporarily lost will be regained.

"When portions of the mainland have been gradually eneroached upon by the ocean, so that navigable channels have been extended thereover, the people, by virtue of their sovereignty over public highways, undoubtedly succeed to the control of such channels and the ownership of the land under them in case of its permanent acquisition by the sea. It is equally true, however, that when the water disappears from the land, either by its gradual retirement therefrom or the elevation of the land by avulsion or accretion, or the exclusion of water by artificial means, its proprietorship returns to the original riparian owners. (*Angel on Tide Waters* 76, 77; *Houck on Rivers*, Sec. 258.) Neither does the lapse of time during which the submergence continues bar the right of such owner to enter upon the land, reclaim it, and assert his proprietorship."

In *Mulry v. Norton*, *supra*, is cited a case arising in Delaware in 1815, decided by the Court of Common Pleas in an opinion by Judge Wilson. Said the Court concerning this case, at page 435:

"The case does not seem to be elsewhere reported. It arose over the ownership of an island called 'Wilson's Bar,' which had been created by alluvium upon land formerly contained within the boundaries of an island called 'Little Tinnicum,' but which at some time had been worn away by the ocean, the court saying:

'The right to the new island, and also to land gained by alluvium or dereliction, all of which are governed by the same principle, follows the right to the soil which is covered by the water. Though the surface of the lower part of Little Tinnicum was destroyed by the force of the winds and waves and it was subsequently overflowed by the water of the river, yet the owner did not lose the propriety of the owner of the remaining land covered by the water. If it was regained either by natural or artificial means it continued to belong to the original proprietor.'

The earth deposited on it became his by the right of alluvium, and of course this island formed on it by such deposit became his, and though it probably has extended beyond the limits of the old island, the addition is plainly alluvium."

A report of this case will be found in a note appended to the case of *Mulry v. Norton*, as reported in 53 Am. Reps. 206.

In *St. Louis v. Rutz*, 138 U. S. 226, in which it was held that if an island or dry land forms on part of the bed of the river, which is owned in fee by the riparian proprietor, the same is his property, the case of *Mulry v. Norton*, *supra*, is cited and approved.

In *Stockley v. Cissna*, 119 Fed. 812, a case between private persons, arising over land at the *locus in quo* in the present suit, in an illuminating opinion by the late Mr. Justice Lurton it was held that land bounded by a navigable river, extending to ordinary low water mark, which is lost by erosion or submergence, is regained by the original owner of the fee, when by reliction or accretion the water disappears and the land emerges; and although the erosion or submergence may have extended across the entire tract and upon the land of an adjoining owner, such owner cannot claim the land upon its reappearance as an accretion to his own; nor has he any claim to accretions beyond the original shore boundary of the submerged tract over the former bed of the owner, which inured to the owner of such tract. Said the Court at page 831:

"As a consequence of the changed course of the river in 1876, these submerged Trigg lands have been restored, through accretion or some other process, and are now dry land. It cannot be pretended that, because the surface of these two bodies of Trigg land was washed off, Trigg lost his title to the land so submerged, beyond recovery. The law is otherwise. Land lost by erosions or submergence is regained to the original owner of the fee when by reliction or accretion the water disappears and the land emerges."

The Court then quotes from Sir Matthew Hale's *De Jure Maris*, *Mulry v. Norton*, *City of St. Louis v. Rutz*, and continues:

"The locality of the Trigg lands is not a matter of dispute. It is, therefore, a matter of no importance how long they have been submerged.

The heirs of John Trigg, or those to whom he conveyed same, are the beneficiaries of the restoration. Accretions east of the Trigg lands must be acce-

tions to Trigg's title as a riparian proprietor, for he did not lose this benefit because for a time his own lands were submerged or wasted by erosion. The new land forming where his land had been inured to him by virtue of his title to the bed upon which the accretion was deposited, but if the accretion extended beyond his original shore line it became an addition to his firm land by the slow and imperceptible movement of his boundary calling for the river."

To the same effect, in a case between the same parties, see *Stockley v. Cissna*, 119 Tenn. 135, 171, et seq.

In *Hughes et al. v. Heirs of Birney et al.*, 107 La. 664, the Mississippi River encroached on DeSoto Point, and later deposited thereon silt, mud and sand, so that land owned by the defendants, which had been submerged, reappeared. Said the Court at page 669:

"Ownership of soil carries with it the ownership of all that is directly above and under it. (C. C. 505.) The ground upon which the river rested temporarily in going over that portion of DeSoto Point, never ceased to belong to defendants, the heirs of Birney, and deposits placed upon it by the river in retiring from it, having been put upon the land belonging to them, became likewise their property. * * *

We are of the opinion that the doctrine of reappearance of land after submergence is the one that controls here, and that the principles governing the acquisition of land by accretion or dereliction are not directly determinative of the controversy, though having a bearing on the same."

The Court then cites *Gould on Waters*, 2 Ed., Sec. 158; *Sir Matthew Hale's De Jure Maris*, and *Mulry v. Norton*, *supra*.

In *City of Chicago v. Ward*, 169 Ill. 392, 48 N. E. 927, 38 L. R. A. 849, 61 Am. St. Reps. 185, it was held that a

riparian owner did not lose his property in land by its submergence or avulsion, if the land is afterward reclaimed, either by natural or artificial means, and that the lapse of time during which the soil was submerged did not bar the owner's rights. This case also cited *Mulry v. Norton, supra*, and the quotations from *Hale's DeJure Maris*.

In *Widicombe v. Rosemiller*, 118 Fed. 295, Island No. 42 in the Missouri River, within the present State of Missouri, was surveyed by the United States in 1820. It then contained about fifty acres. Subsequently, during floods, it was submerged, and a portion of the surface was washed away, but on the subsidence of the waters a portion of it reappeared, and at no time was it washed away to the level of the bed of the river. About 1880 the river cut a new channel, commencing above the island and returning to the old channel below it, which enclosed about eleven hundred acres, and left the old channel and island dry. Thereafter, the plaintiff entered the island as public land, and received a patent therefor, according to the original survey. *Held*, that the title of the United States to the island was not lost by the erosion or submergence, and that by its conveyance after it reappeared, on the reliction of the waters, plaintiff took title thereto with the additions made by alluvium and accretion. The court quoted from *Mulry v. Norton, supra*, *Sir Matthew Hale's De Jure Maris*, *Morris v. Brooke*, Delaware Common Pleas, and *St. Louis v. Rutz*, and held the title of plaintiff good under his patent from the United States.

So, in *Randolph v. Hinck*, 115 N. E. (Ill.) 482, it was held that the owner of Hinek Island, which had been submerged, was entitled to it on its reappearance, citing *Mulry v. Norton*, *Hale's De Jure Maris*, and *Chicago v. Ward*.

All of these cases, except *State v. Muncie Pulp Co.*, applied the doctrine where private boundaries were in dispute, and no questions of international law were involved in them. The only case applying the doctrine in a boundary dispute between States is *State of Tennessee v. Muncie Pulp Co.*, 119 Tenn., but this Court has repeatedly held that in boundary disputes between nations the same rules relating to disputes between individuals will be applied.

Trustees v. Hopkins, 8 Porter 9.

Nebraska v. Iowa, 143 U. S. 359.

Opinions of Attorneys General, Vol. 8, p. 175.

In *Nebraska v. Iowa*, *supra*, it was said:

“Our conclusions are that notwithstanding the rapidity of the changes in the course of the channel and the washing from the one side and on to the other, the law of accretion controls on the Missouri River, as elsewhere, and that not only in respect to the rights of individual land owners, but also in respect to the boundary lines between States. The boundary, therefore, between Iowa and Nebraska is a varying line, so far as is affected by these changes of diminution and accretion in the mere washing of the waters of the stream.”

It is the contention of Tennessee, as stated by its Supreme Court in *State v. Pulp Co.*, 119 Tenn. p. 133, that the rule contended for is a just and equitable one. Said the Court:

“The right of restoration to their lands was one of the vested rights of those grantees, and the right of Tennessee to be restored to her share of the original channel was one of her vested rights. These were the rights of the parties that existed at the time of the avulsion, and were vested and settled by it, and which they had a right to have worked out and adjusted.

It restores all parties to their original estates, and does justice to them all. If the result of the avulsion had only affected the waters of the river, so far as to cause them to recede from the lands of the riparian proprietors on the Tennessee banks, and occupy the channel as it existed in 1823, it would not be denied that the line would now be the center of the bed as it was in 1823. That the entire old bed was abandoned cannot change the rights of the parties. The others interested cannot be restored to their own by the forces of nature, and Tennessee entirely eliminated and denied any benefit of the reliction of the waters. She cannot in this way be deprived of the property, when the same can without doubt be identified and located."

The effect of the decision of the Tennessee Supreme Court was this: To restore to those grantees of lands on the Arkansas side what belonged to them, up to high water mark, which had been submerged by the action of the waters. Since it is the rule in Arkansas that riparian owners hold only to high water mark, as held in *Railroad v. Ramsey*, 53 Ark. 314, 13 S. W. 931, 8 L. R. A. 559, it restored to Arkansas all that part of the bed of the river which lay between high water mark and the middle. Since in Tennessee the riparian owner holds to low water mark (*State v. Muncie Pulp Co.*, *supra*), it restored to Tennessee its part of the bed from low water mark to the middle, and to its grantees lands which had been lost by them through submergence, erosion and caving in of the Tennessee bank.

Nor do we think that the authorities cited by learned adversaries at pages 18 and 19 of their brief are very helpful in arriving at a correct determination of this question. Many of these cases dealt strictly with accretions, many with the doctrine of reliction, in its narrow sense, that is, as an imperceptible recession of the water

from the shore of the stream; in most there was no abandonment of the bed of the stream; and in many the courts had before them the rules relating to the apportionment of accretions between riparian owners.

Thus, in *Jones v. Johnson*, 18 How. 150, 156, accretions were dealt with.

Warren v. Chambers, 25 Ark. 120, 91 Am. Dec. 538, was a case of gradual recession of waters in a lake.

In *Fowler v. Wood*, 73 Kan. 511, 85 Pac. 763, 6 L. R. A. (N. S.) 162, an avulsion had submerged lands, which later reappeared, and the court applied the doctrine of submergence and reappearance, for which we are contending. This case cited and relied on *St. Louis v. Rutz*, *City of Chicago v. Ward*, *Mulry v. Norton*, *Morris v. Brooke*, and *Hughes v. Heirs of Birney*.

Collins v. State, 3 Tex. App. 323, simply held that an avulsion did not carry the boundary between the Choctaw nation and Texas to the new channel.

Bouvier v. Stricklett, 40 Neb. 792, involved the application of the doctrine of accretions, and the doctrine of submergence and reappearance was not involved.

Peuker v. Canter, 62 Kan. 363, involved the doctrine of apportionment of accretions between riparian owners. Peuker owned forty acres, separated from a river by a fractional quarter section. The river encroached on the land by eroding into the bank and ate away part of Peuker's lot; then the river receded and accretions formed, extending the land beyond its former boundary. It was held that title to Peuker's land washed away by the erosion was extinguished, and that the accretions forming on the new bank should be apportioned between Peuker and the adjoining riparian proprietor, in proportion to their shore lines.

Again, in *Hammond v. Shepard*, 186 Ill. 235, the doctrine of submergence and reappearance was not involved. There were some general observations on the law of relictions; but the point decided was that a reliction must be from the owner's shore line, and it was held that the plaintiff failed to establish this.

Wallace v. Driver, 61 Ark. 429, 31 L. R. A. 609, was decided by a divided court. It appeared that part of a fractional quarter section lying along the banks of the Mississippi River, was lost by erosion. A bar formed within the original boundaries of the fractional quarter section, and it was held by the majority that the original owner of said fractional quarter section was not entitled to the bar formed within his original boundaries. The court recognized the doctrine of submergence and reappearance, when lands were lost by avulsion. Mr. Chief Justice Bunn dissented, citing *Mulry v. Norton* to sustain his dissenting opinion.

It must be borne in mind that in this case the abandonment of the bed of the stream was not involved, and that the title of the riparian owner, under the laws of Arkansas, extended only to high water mark.

In *Noyes v. Collins*, 92 Ia. 566, 26 L. R. A. 609, a lake drained itself in one year, through the combined action of natural causes and certain ditches dug in its vicinity. It was held that the riparian owner did not take adjacent land left dry, because he did not own to the center of the bed of the lake. It appeared in this case that the lake had been meandered by government surveyors.

Cox v. Arnold, 129 Mo. 37, was similar to the Arkansas case of *Wallace v. Driver*, *supra*. A towhead had formed within the boundaries of an original tract eroded through the action of the water on the banks, and the owner of

the eroded fractional quarter section was held not entitled to the towhead formed within the boundaries called for by his deed. In this case there was a dissent by Chief Justice Brace. It does not appear that the doctrine of submergence and reappearance was called to the attention of the court, for it was not noticed in the opinion.

Sapp v. Frazier, 51 La. Ann. 1718, merely decides that the annual recession and rise of waters in a lake does not constitute reliction.

In *Perkins v. Adams*, 132 Mo. 131, it was held that the owner of the shore did not take title to an island formed in a river, which gradually attached itself to the shore, because the land was not relictied or accreted from his shore line.

Naylor v. Cox, 114 Mo. 232, 243, is similar to *Cox v. Arnold*, involved the same land, and was a suit between the same parties.

In *Boorman v. Sannucks*, 42 Wis. 233, 245, it was held that the evidence was so vague as to make it impossible to determine from the record whether certain lands had been relictied or not. The case did not involve the doctrine of submerged and reappearing lands.

Nix v. Dickerson, 81 Miss. 632, held that land carried from one side of a river to the other by an avulsion was not lost to the original proprietor.

Bellefontaine Improvement Co. v. Neidringhaus, 181 Ill. 426, was a disputed boundary line case, and involved the doctrine of avulsions and accretions to the old shore. There was no abandonment of the bed of the river, and the doctrine of submergence and reappearance was not involved.

In *Carr v. Moore*, 119 Ia. 152, it was held that a lake with no defined shore, which fills up and dries up with the change of seasons, which is in a low and swampy country, fed only by surface water, is not such a lake as permits of the application of the doctrines of reliction and accretion.

Nor was the doctrine of submergence and reappearance involved in the case of *Wilson v. Watson*, 141 Ky. 324, 138 S. W. 283.

The state of facts in the case at bar is unusual, and permits of the readjustment of boundary lines so as to restore to each grantee in Arkansas and Tennessee his lands affected by the changes from time to time in the course of the Mississippi River during a period of approximately forty years. It is the contention of Tennessee that the case is to be distinguished from cases like *Peucker v. Canter*, *supra*, where the river still ran adjacent to lands which had been affected by erosions, accretions and relictions, and this because of the very basis of the rule governing accretions.

It is said in 1 *Rul. Cas. Law, Tit. Accretion*, Sec. 4:

"The courts have not fully agreed as to the principle on which the law of accretion is founded. One reason given for this rule, on the authority of Blackstone, is that of *de minimis non curat lex*. This reason is generally considered very unsatisfactory, and the generally accepted basis of the rule is that as the owners of the lands adjoining rivers must suffer the loss by wasting and diluvian of their soil, so they are entitled to the gain by accretion; that as the government does not warrant the patentee against losses, so it will not claim the gains to his lands; for it is but equitable that as he must run the hazard of loss, so he should be entitled to the chances of gain. By some courts, however, it has been said that the

rule is derived from the principle of public policy; that it is to the interest of the community that all lands should have an owner, and most convenient that insensible additions to the shore should follow the title to the shore itself; while still others sustain the rule on the broad principle that its purpose is to preserve the fundamental riparian right of access to the water which often constitutes the principal value of the land."

None of these reasons, it seems to us, should weigh in fixing a rule to be applied to the peculiar facts of the case at bar.

Nor do we think it equitable that the rule should be carried to the extent it has been by some courts, as it has in Missouri, Arkansas and Kansas. It seems to us a harsh and inequitable doctrine to hold that lands, which are washed away through the process of erosion, until the river flows over lands beyond the upland bounds of the original riparian grant, and then recedes again, extending the shore line out back into the old bed of the river, through the process of accretion and reliction, should be owned by the upland proprietor, who became riparian through the action of the water; and that the owner of the original riparian grant should lose his title, even though the lands be so restored that they may be identified either by marks or other description. This, it seems to us, is extending a rigid rule of law beyond the point justified by its reason; but, however that may be, it is our contention that where the waters entirely cease to flow over the bed of the river, all owners should be restored to their original lands, where the same may be identified.

The cases are uniform in holding that where land is lost by submergence, caused by avulsion, the owner is

entitled to them on their reappearance. We do not see why any distinction should be made where lands are lost through the process of erosion, especially where the bed becomes dry and each may be restored to his own. We think the better rule is supported by the cases of *Stockley v. Cissna*, 119 Fed. 812; *Widicombe v. Rosemiller*, 118 Fed. 295; *Stockley v. Cissna*, 119 Tenn. 135, and *State v. Pulp Co.*, 119 Tenn. 47.

The rule may be quite different where the river changes in direction, but does not cease to flow. As was said in the case of *In Re City of Buffalo*, 206 N. Y. 319, 99 N. E. 850, in denying to a riparian owner compensation for the destruction by the city of his right to regain certain lands entirely submerged by erosion, by declining to apply the doctrine of *Mulry v. Norton*, that it was not shown that there was a reasonable hope or expectation that the lands could be reclaimed. Such a case is quite different from one where a river has abandoned its bed, leaving it entirely dry and making it possible to restore to every one what he lost through the action of the waters on the banks of the stream.

CONCLUSION.

Tennessee, therefore, respectfully submits that the boundary between it and Arkansas is a line drawn along the center of the stream, at a point equidistant from its principal and well-defined banks, first, because the rule of international law, applying the doctrine of the *thalweg*, is inapplicable after the stream runs dry, for there is then no necessity to preserve equality in the rights of navigation and fishery between the adjoining States; and, secondly, because Arkansas and Tennessee have, by

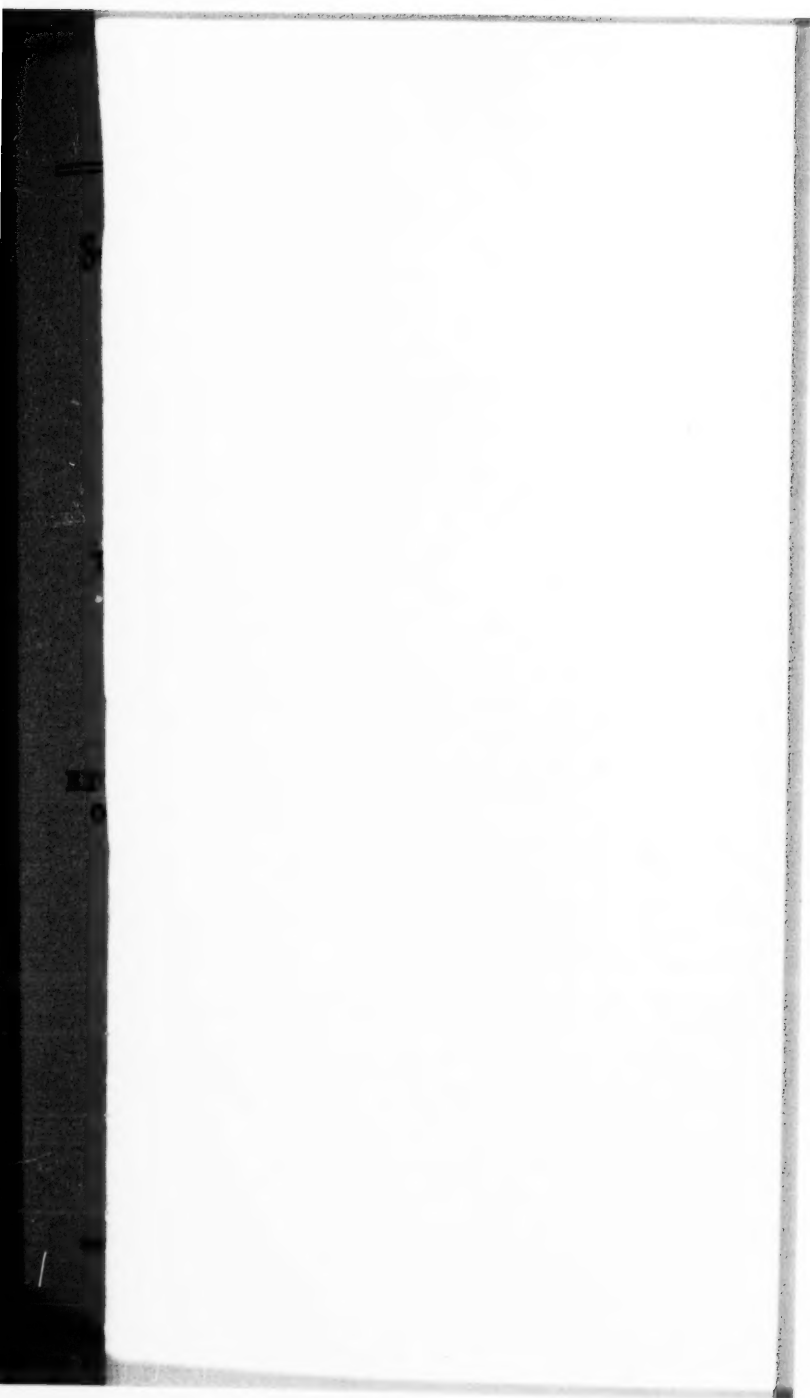
agreement, acquiescence and the long exercise of sovereignty, established a line at the point contended for.

Again, Tennessee contends that after the old channel ran dry, the owners of the banks and the bed should be restored to their own, according to original boundaries fixed before the river changed its course or moved laterally in its bed, such lands being still susceptible of definite location.

All of which is respectfully submitted.

FRANK M. THOMPSON,
Attorney General of Tennessee.

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Solicitors for State of Tennessee.



NOV 12 1923

WM. B. STANLEY

Supreme Court of the United States

OCTOBER TERM, 1923

2
No. 1 Original

THE STATE OF ARKANSAS, Complainant

vs.

THE STATE OF TENNESSEE, Defendant

**EXCEPTIONS OF DEFENDANT, THE STATE
OF TENNESSEE, TO THE REPORT OF C.
B. BAILEY, ET AL. COMMISSIONERS**

FRANK M. THOMPSON,
Attorney General of Tenn.

G. T. FITZHUGH,
Counsel.

Supreme Court of the United States

OCTOBER TERM, 1923

No. 4 Original

THE STATE OF ARKANSAS, Complainant

vs.

THE STATE OF TENNESSEE, Defendant

EXCEPTIONS OF DEFENDANT, THE STATE
OF TENNESSEE, TO THE REPORT OF C.
B. BAILEY, ET AL, COMMISSIONERS

Now comes the State of Tennessee, by its Attorney General and Counsel, and respectfully represents that it is greatly aggrieved at the action and report of the Commissioners filed herein. It excepts to the report as a whole, and to the actions, findings, and conclusions of said Commissioners as being contrary to the decree of reference, and unwarranted by the evidence produced.

For causes of exceptions, defendant states the following:

I.

Because it was clearly contemplated by the interlocutory decree of reference, (Par. 6) that the Commissioners, before attempting to locate the main channel of commerce of 1876, just prior to the cut-off, between the points designated in said decree, should have all proof submitted on behalf of both parties hereto, as to whether, under existing conditions it was possible to locate with reasonable certainty the main channel of commerce of 1876 as it existed at the time of the cut-off, and, if so, where the same should be located. Whereas, said Commissioners undertook to locate said line, and entirely completed their survey, as shown by map, Exhibit "B", in September, 1920, before any evidence had been adduced on behalf of the defendant, and before the defendant had cross-examined witnesses of complainant. (See Report, Page one, showing that the survey was begun on July 26, 1920, and Exhibit "B" to report, showing that it was completed September, 1920). Printed proceedings of Commissioners show that only one hearing, to-wit, on July 15, 1920, had been held prior to the completion of the survey; that all other sessions for the hearing of proof, to-wit; December 20, 1920; March 3, 1921; March 24, 1921, and April 15, 1921, were subsequent to the completion of the survey shown by Exhibit "B". (Printed proceedings, Pages 196, 382, also Page 2 of Report Commission.) All the testimony and records embraced within Pages 196 to 504, inclusive, were introduced at the hearings held by the

Commission after the line had been agreed on, and the survey completed.

II

Because, contrary to the decree of reference requiring evidence of witnesses "to be taken upon notice to the parties with permission to attend by counsel and cross-examine the witnesses" (Par. 6), several depositions were taken by the Commission without notice to parties or counsel. (Printed proceedings, Pages 190-195).

III

Because, contrary to the stipulation of counsel (original transcript, Pages 42 and 44), and decree of reference (Par. 6), requiring all evidence, maps and documents to be preserved and certified and returned with the report of the Commissioners, 22 maps, listed on Pages 4 and 5 of the Report, were not filed, for reasons given by the Commission on Page 5 of its report. The Exceptor states that many of these maps are exhibits to testimony of witnesses offered by this defendant; others of said maps are frequently referred to by said witnesses, and without the maps much of their testimony would be unintelligible. When this exceptor began the preparation of these exceptions it addressed a communication to the Commissioners insisting that said maps should be filed at once with the clerk of the Supreme Court of the United States as part of the proceedings herein. That the fact that the same maps had been used in a case in the Supreme Court of Tennes-